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No. [redacted]

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IN THE

SUPREME COURT OF THE UNITED STATES

DUFFY STORAGE AND MOVING CO., JAMES A. DUFFY, GEORGE V. SIMONE, DENVER AUTO TRIMMING SUPPLY CO., HOUSTON GIBSON, WINSLOW CRANE SERVICE CO., THOMAS & SON TRANSFER LINE, INC., AND RIDGE ERECTION CO.,
Appellants.

vs.

THE CITY AND COUNTY OF DENVER, A MUNICIPAL CORPORATION, THE BOARD OF COUNCILMEN OF THE CITY AND COUNTY OF DENVER, SOMETIMES ALSO KNOWN AND REFERRED TO AS THE CITY COUNCIL OF THE CITY AND COUNTY OF DENVER, AND ROBERT B. KEATING, JOHN F. KELLY, IRVING S. HOOK, PAUL A. HENTZELL, KENNETH A. MacINTOSH, CARL W. DeTEMPLE, EDWARD F. BURKE, JR., ELVIN L. CALDWELL, ERNEST P. MARRANZINO, AS THE MEMBERS OF AND BEING AND CONSTITUTING THE BOARD OF COUNCILMEN OF THE CITY AND COUNTY OF DENVER, SOMETIMES ALSO KNOWN AND REFERRED TO AS THE CITY COUNCIL OF THE CITY AND COUNTY OF DENVER, AND CHARLES L. TEMPLE, AS MANAGER OF REVENUE OF THE CITY AND COUNTY OF DENVER,
Appellees.

JURISDICTIONAL STATEMENT AND APPENDICES.

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Appellees.

JURISDICTIONAL STATEMENT AND APPENDICES.

Come now the Appellants above named, by their Counsel, and under and in pursuance of Rule 15 of the Rules of the Supreme Court, make the following Jurisdictional Statement.

1(a). This Appeal arises from and upon Judgment of the Supreme Court of Colorado, in its consolidated actions, being *The City and County of Denver, etc., et al., vs. Duffy Storage and Moving Co., et al.*, No. 23940, and *Duffy Storage and Moving Co., et al. vs. The City and*

County of Denver, etc., et al., No. 23941, consolidated, in which Opinions of the Court were rendered February 5, 1969, following which, and within the time prescribed by the Rules of Civil Procedure of the State of Colorado and the Orders of the Supreme Court of Colorado Petition for Rehearing was filed. That Petition For Rehearing was denied, and remittitur (which is the final judgment of the Supreme Court of Colorado under its procedures) was issued on February 17, 1969; remitting the matter to and instructing proceedings by the District Court in and for the City and County of Denver, and in substance upholding, by divided opinion as to parts of the matters before the Supreme Court, and by unanimous opinion as to others, the decision below.

The Opinion of the Court, not yet officially reported, appears in 450 P.2d 339. The Opinion of the Court was delivered by Mr. Justice Day (Appendix A-1). Mr. Chief Justice McWilliams, Mr. Justice Pringle, and Mr. Justice Groves specially concur, there being Special Concurring Opinions by Mr. Chief Justice McWilliams (Appendix A-2), and Mr. Justice Groves (Appendix A-3). Mr. Justice Hodges, Mr. Justice Kelley, and Mr. Justice Lee concurred in part and dissented in part, there being filed a dissenting Opinion by Mr. Justice Hodges (Appendix A-4), concurred in by Mr. Justice Kelley and Mr. Justice Lee, and an Opinion of Mr. Justice Kelley, concurring in part and dissenting in part (Appendix A-5).

1(b). The within appeal is from a final judgment of the Colorado Supreme Court involving provisions of the Constitution of Colorado, with relation to which the Colorado Supreme Court has, in a proceeding wherein is drawn in question validity of a statute or Statutes of the United States, including the Enabling Act of the State of

Colorado, decided against validity or applicability of those Federal statutes and refused to apply them. In the same proceedings, there is drawn in question the validity of Colorado Constitutional provisions and Ordinances and Charter Provisions of the City and County of Denver upon the ground of repugnance to the Constitution and laws of the United States, and the Supreme Court of Colorado has decided in favor of validity of those Colorado and Denver provisions, in such manner as to ignore and to fail to give full force, credit, and effect to statutes and the Constitution of the United States.

Appeal is taken pursuant to Title 28, USCA, Section 1257(1) and Section 1257(2):

"1257. State Courts; appeal; certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

FACT STATEMENT AND STATUTES INVOLVED

I. The City and County of Denver, a municipal corporation, organized and existing as a Home Rule City and as a City and County under the provisions of Article

XX of the Constitution of Colorado (printed as to its applicable provisions as Appendix B-1), has, by three ordinances, numbers 232 (Appendix C), 233 (Appendix D), 234 (Appendix E), Series of 1968, attempted to impose, respectively, a "Business Occupational Privilege Tax" upon all persons engaged in business, directly or indirectly, in the City and County of Denver, an "Occupational Privilege Tax Upon Employees"; and an "Earnings Tax For General Revenue Purposes."

Each of those essayed taxes has been challenged by the Appellants, as Plaintiffs below, bringing their action representatively and as affected taxpayers, being in some cases, residents and other non-residents of Denver, and conducting business located both in and out of Denver and in some cases in interstate commerce.

The matter was tried in the Trial Court, and heard in the Supreme Court of Colorado, upon Stipulation as to the facts. (Appendix F) There were and are no factual issues presented, and only questions of substantive legality, as a matter of State Constitutional Law, and as of Constitutional Law of the United States are involved.

Both the Trial Court and the Supreme Court of Colorado have held, as a matter of State Constitutional Law, that the City and County of Denver is without power to enact an income tax; that the so-called "Earnings Tax", proposed under Ordinance 234, is an income tax, and that, accordingly, Ordinance 234, Series of 1968, purporting to levy a 1.4% earnings tax for general revenue purposes, is void and of no effect.

Both the Trial Court and the Supreme Court of Colorado have upheld the other two ordinances, numbers 232

and 233, imposing the so-called "occupational privileges taxes", though the Supreme Court has done so by highly divided vote, and upon grounds indicated in the five separate opinions, set forth as Appendices A-1 through A-5.

Insofar as concerns employers; the so-called occupational privilege tax is imposed upon them upon the basis of two dollars monthly per employer *having any situs direct or transitory for any period of time whatsoever in the City and County of Denver*, to which two dollars is added the sum of two dollars for each employee of such employer.

Insofar as concerns the employee, the so-called occupational privilege tax, separately enacted, required to be withheld by the employer, and payable in addition to the sums required to be paid by the employer himself, requires payment regardless of place of residence, and regardless of actual place of employment, if there is any connection of the employment with the City and County of Denver, however transistory or however casual. It has, in fact, been stated by the City and County of Denver's representatives, in argument to the Supreme Court of Colorado that the tax is chargeable against a Federal Judge entering Colorado on circuit to perform his assigned duties in the Federal Courthouse in the City and County of Denver, or against and upon a member of the General Assembly, the Legislature of Colorado, entering the City and County of Denver to represent his constituency in the State's House of Representatives or Senate.

The Attorney General of Colorado has advised by official Opinion, referred to in the proceedings, that the

State will not withhold the tax so far as concerns State employees; the United States and its several agencies have declined to withhold; and the School District has taken similar action. Of course, none of these governmental entities will pay the tax levied upon employers.

By the express terms of the enacting ordinances, each of the taxes is deliberately imposed upon persons non resident in Denver, having no representation in the imposition thereof, and for the most part paying full taxes in the loci of their several residences, for the avowed purposes of supporting the municipal functions of the City and County of Denver. Each of the ordinances announces that its purpose is to require persons resident in the suburbs outside Denver, as well as non-resident businesses, to contribute to the internal support of Denver—although each such organization or employee already so supports his or its own community—under the contention that Denver, as the so-called "core city" in a "metropolitan area" has the right so to impose a tax burden upon persons entirely outside its taxing jurisdiction.

It is admitted that there is, in the Constitutional law of Colorado, no such concept either as "core city" or as a "metropolitan area". Denver claims that this concept is permissible under Article XX of the Colorado Constitution, providing for so-called "home-rule" government of cities. It is here contended, and has been so held by the Supreme Court of Colorado in numerous cases, that if such a principle were admitted, then Article XX of the Colorado Constitution would offend the requirements of Republican form of government under the Constitution of the United States, and would also offend against the Enabling Act of Colorado, as well as being repugnant to the principles of due process and equal pro-

tection of the laws under the Fourteenth Amendment to the Constitution of the United States. Insofar as concerns the City's efforts at an income tax, these principles are conceded by the Colorado Supreme Court, which, dividedly, has attempted to uphold the identically based "occupational privilege taxes" as exempt from the theory.

The professed basis for all three taxes, and the permitted allowance of the fictional "occupational privilege" taxes is in effect the creation of the City and County of Denver as a City-State or sovereign *imperium in imperio*, contrary to the requirements of the Constitution of the United States, dividing sovereignty among the States, the United States, and the People, but not granting it extra laterally to any City.

Various exemptions are granted under the ordinances. Persons earning $250.00 monthly or less from one employer—regardless of total earnings—are absolutely exempt. They may, of course, earn aggregately any sum and not pay tax. However, persons earning any sum in Denver, no matter how minute, if in the aggregate their earnings from their employers, not connected with Denver, exceed $250.00 monthy, must pay the full amount. There is, accordingly and clearly, no tax on an occupation, but a tax upon earnings (an income tax, by definition, and as indicated by the attached opinion, if so, void under Colorado law), and is accordingly a total deprivation of the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States.

Moreover, if there exist an occupational privilege tax, then there must be a "privilege" which is taxed. Expressly, admittedly in the pleadings and stipulations, and undisputedly these taxes and taxing measures do not li-

cense; they do not regulate; and they are cumulative of Federal, State, and local occupational licensing provisions. Admittedly, the Plaintiffs are all engaged in business operations, already licensed so to engage, and, as to the larger number, so licensed by the City and County of Denver, the State of Colorado, and the United States. The United States is involved in licensing several of them, through the Interstate Commerce Commission, as interstate carriers of goods and merchandise in interstate commerce. There accordingly occurs a double taxation, the same taxing entity, Denver, twice taxing the same subject matter, the professed "privilege" to engage in business.

The so called "privilege" tax, however, is not a tax upon any privilege, but rather upon a fundamental constitutional *right*; the right to make a living, not involving "privilege" at all. Such taxation is simply income taxation, discoordinate and unequal in application without rational basis for the classification, and directly violative of the principles of equal protection of the laws as guaranteed by the Fourteenth Amendment to the United States Constitution.

It is explicitly claimed by Denver that the taxes are applicable to employment by the Government of the United States; that they apply to interstate commerce; and that there is a right to exclude persons not paying the taxes from employment in the City and County of Denver; to bar them from their governmental or commercial employments; to punish them by fine or imprisonment for a failure to pay; and to punish by fine, imprisonment, or confiscation of property their employers for failure to withhold such exactions from the salaries of non-resident employees.

Article II, Section 10(2) of the Constitution of the United States operates to prevent the imposition of trade barriers by any state or its subdivisions. Article I, Section 8(3) of the Constitution of the United States gives to Congress an exclusive control of commerce among the States. The Enabling Act of Colorado (Appendix B-2), coupled with the provisions as to Commerce of the Constitution of the United States, and in conjunction with the provisions of the Fourteenth Amendment to the Constitution of the United States, preclude the erection by cities within a state of trade barriers and restrictions of the kind here sought, or extension of monetary levy beyond the territorial bounds of the City.

It is stated in the record and undisputed that in Colorado there are some two dozen Cities having, if this power be allowable to Denver, identical power as home-rule cities. It is clear that if each one of these Cities should impose the so-called "occupational privilege tax" upon each employee of each employer having any casual contact with the city, any kind of commerce within the State, or between the States, would be gravely imperiled.

The within action involves, particularly, the Enabling Act of the State of Colorado, a Statute of the United States (reprinted, as to its applicable provisions) as Appendix B-2 hereto, and involves, as well, Article II, Section 10(2) of the Constitution of the United States, as concerns the unauthorized imposition of trade barriers by any state or its subdivisions, and Article I, Section 8(3) of the Constitution of the United States, giving exclusivity of control of commerce among the States to the Congress of the United States. It involves, as well, and in the several aspects mentioned, the Fourteenth Amendment to the Con-

stitution of the United States, both in its equal protection and due process aspects.

These matters are all pleaded.

Each has been suitably invoked, and the Supreme Court has upheld the said Ordinances as against these several provisions of the Constitution and Statutes of the United States, thus giving this Honorable Court jurisdiction.

Applicable dates of proceedings in the District Court and the Supreme Court of the State of Colorado are as follows:

1. Complaint was filed in the District Court on December 9, 1968, acceptance summons being accepted both by the City Attorney and the Attorney General, who waived appearance and did not choose to appear.

2. Stipulation of facts was entered into on December 11, 1968, and immediately filed.

3. Answer was filed December 13, 1968.

4. Trial was had on the 18th and 19th of December, 1968, on which latter date the matter was taken under advisement by the Court, which entered judgment on December 20, 1968, enjoining enforcement of Ordinance 234, and sustaining Ordinances 232 and 233.

5. Motions for New Trial were filed by the parties respectively on December 23, were argued on December 24, 1968, at which time the motions were denied. Appearances: Amicus Curiae had been allowed to Frontier Airlines and Air Line Pilots Association, though these persons

are not parties, each of them objecting to the several taxes involved.

6. Joint designation of the record was filed on December 26, 1968, and the Reporter's Transcript was prepared and Lodged January 3, 1969.

7. Each of the parties sought writs of error, as above indicated, on December 31, 1968, and those writs were duly issued.

8. Motion to consolidate, relative to the filing of briefs, and for advancement on the Docket and for Oral Argument were filed with the Supreme Court on January 6, 1969 ,and those motions were granted by the Court en banc on January 9, 1969.

9. Briefs were duly filed within the shortened period allowed for them, and the matter was orally argued January 22, 1969, and taken under advisement, opinions being rendered on February 5, 1969. Time for Motions For Rehearing was abbreviated to February 13, 1969.

10. Motion for rehearing was filed on February 10, 1969, and the Motions were denied and remittitur issued February 17, 1969, this being the final judgment of the Supreme Court.

11. Notice of Appeal to the Supreme Court of the United States was filed with the Supreme Court of Colorado March 12, 1969, and the record was there designated, everything in the record being designated to be sent as the record on appeal. The record was certified March 20, 1969.

CASES BELIEVED TO SANCTION JURISDICTION AND QUESTIONS PRESENTED BY APPEAL

It is, quite clear that there has developed in recent years a concentration of population into some thirty central municipal areas, or megapolitan areas, and that the attempt of the "core city" or self-ordained central municipality in each of those areas to exact monetary tribute of the persons extra lateral to it could result only in commercial chaos. To permit any such activity on the part of any municipality would require a fundamental restructuring of the Constitution of the United States, in order to create that kind of entity which we have heretofore considered alien to the Constitution, that is the sovereign city-state or *imperium in imperio*.

As we shall mention, this problem has heretofore arisen, before the Supreme Court of the United States, with reference to the City of New York. It is currently in litigation with reference to the City and County of San Francisco *vis-a-vis* the Counties immediately surrounding it and within commuting distance of it. It is explicitly involved in the Denver taxing attempt, commonly referred to in the City and its environs as the "head tax".

It has, therefore, been contended and is now so contended that the tax attempt made fundamentally involves an alteration of basic constitutional governmental structure improper in the extreme an impermissible by municipal action.

The ordinances upheld, numbers 232 and 233, each appear specifically to authorize confiscation of private property for public or private purposes without compensation and a taking of property without due process, in violation of the Fourteenth Amendment.

Each of these questions has been expressly brought to the attention of the Supreme Court of Colorado. That Court has dividedly sustained Ordinances 232 and 233, while rejecting ordinance 234 unanimously.

In the several opinions printed as Appendices A-1 through A-5, various of the opining justices have relied upon and adopted each of the theories and contentions herein set forth. When among seven justices, writing upon three ordinances, there are five opinions, resulting in the invalidation absolutely, of one of those ordinances—the basic income tax—and upholding others only by a 4 to 3 vote, and when the essential questions are federal constitutional questions, it is most respectfully submitted that the matter is one involving sufficient Federal significance to be resolved before this Honorable Court, particularly when the same pattern of tax, with like and identical involvement, has already been held improper by this Court, in the case of New York; when it has been rejected by the California Court in the San Francisco situation; and when the municipal restructuring of the United States is necessarily such as to make recurrent the problem in each of the concentrated urban areas now containing the substantial part of the American population.

A. DENVER HAS NO AUTHORITY TO TAX EXTRATERRITORIALLY AS THE SELF-ASSERTED "CORE CITY" OF A "METROPOLITAN AREA".

Denver asserts a right, in each of the assailed ordinances, to exercise taxing authority over persons and businesses sited outside itself by reason of an asserted position as a "core city" within a "metropolitan area." It has no such position, nor any position different from any other home rule city in Colorado, of which some two dozen

exist, and by which Denver is on all sides abutted. Not only so, but such a contention introduces into our scheme of government the forbidden City-State or *imperium in imperio* theory, long held by the Colorado Court to be so entirely repugnant to the Constitution of the United States as to invalidate Article XX of the Colorado Constitution were that Article interpreted to permit application of any such theory or to admit of any such claim of power as here asserted by Denver.

People vs. Sours, 31 Colo. 369, 384, 74 Pac. 167, remains the Law in Colorado. It was there argued that Article XX of the Colorado Constitution meant that Denver, within its boundaries might replace the laws and Constitution of Colorado absolutely, a contention rejected by the Colorado Supreme Court as repugnant alike to the Constitution of the United States and the Enabling Act of Colorado:

> "If this amendment must be given that construction, it cannot be sustained. Even by constitutional amendment, the people cannot set apart any portion of the state in such manner that that portion of the state shall be freed from the constitution, or delegate the making of constitutional amendments concerning it to a charter convention, or give to such charter convention the power to prescribe the jurisdiction and distinguished from municipal or city government . . . Under the constitution of the United States, *the state government must be preserved throughout the entire state;* it can be preserved only by having within every political subdivision of the state, such officers as may be necessary to perform the duties assumed by the state government under the general laws as they now exist or as they may hereafter exist." (Emphasis supplied).

This holding, that under federal constitutional law, Denver is not and cannot be superior to the State, or outside it, but a part of it and subject to all of its laws, and that other parts of the State, of necessity, cannot be tributary or subordinate to Denver, is sustained in the later *People vs. Johnson*, 34 Colo. 143, 154, 86 Pac. 233, which leaves no doubt as to precisely what the Supreme Court of Colorado meant in the *Sours case* above:

> "Referring now to the construction placed by this court on article XX, the learned justice who wrote the majority opinion in the Sours case used this language: 'If this amendment must be given *that construction* (Emphasis by the Court) it cannot be sustained.'
>
> "What construction? Unquestionably the construction contended for by counsel who were seeking to establish the invalidity of the amendment, the construction stated in the quotation immediately preceding and which called forth the declaration above quoted. The construction contended for here — a construction which would 'cut loose the city and county of Denver from any and all constitutional limitations and restrictions and make the people, whether deliberately or hysterically expressed, the law in that locality.'
>
> "In the Sours case the court repudiated such construction and upheld the validity of the amendment, saying: 'The amendment is to be considered as a whole in view of its expressed purpose of securing to the people of Denver absolute freedom from legislative interference in matters of *local concern* (Emphasis by the Supreme Court); and so considered and interpreted we find nothing in it subversive of the

state government or repugnant to the constitution of the United States.'

"If the majority of the Court in the Sours case had been of the opinion that article XX had for its purpose the securing to the people of Denver absolute freedom from legislative interference *in all matters* (Emphasis by the Supreme Court) relating to county and state governmental offices, officers, and functions, the inevitable conclusion would have followed that the amendment would have been subversive of a republican form of government and repugnant to the Constitution of the United States." (Emphasis supplied).

If Denver, then, may compel persons in all cities outside her boundaries, and all persons having commerce with her, to pay taxes to her on the theory that she is a "core city" in a "metropolitan area" and so entitled to support, while those persons must in identical manner contribute to the municipal support of the places of their own domicile, then Denver is made in a sense sovereign over other parts of this state, and is created an imperium in imperio, which, as pointed out by the Colorado Court is federally forbidden:

"To concede that article XX authorizes a charter convention to legislate upon *any subject whatever*, in contravention of *any* of the provisions of the constitution relative to governmental or state matters or county or state offices and officers, is to concede that such convention might displace the constitution in every respect, and the charter, being the organic law of the city and county, would thereby become supreme within the territory included in the boundaries of the city and county; hence we would have a portion of the state free from the constitution—over which the state

had not right to legislate—which could have no interest whatever in any legislation which might be enacted by the state relating to state governmental affairs. In short, an imperium in imperio, a condition which cannot be brought about or exist even by constitutional amendment as emphatically decided by the majority opinion in the Sours case." (Emphasis by the Court).

If as stated by the Court, by Constitutional Amendment it is impossible to Constitute Denver an empire within an empire, a state within a state, then Denver cannot by ordinance declaration require persons outside the City, under the pretext of "occupational privilege", to support the City in its intimate and municipal activities, under the claim that it is a special kind of "core city" in a "metropolitan area".

The impossibility of such a situation is pointed out clearly by Mr. Justice Kelley, in his dissenting opinion (Appendix A-5):

"Mr. Justice Hodges would hold Ordinance No. 233 invalid because, irrespective of its label, it is an income tax and invalid by virtue of *Denver vs. Sweet*, 138 Colo. 41, 329 P.2d 441. However, if it is an *occupational tax* its validity must be premised on the proposition that it is *local and municipal* in concept rather than of state-wide concern.

"Denver attempts to justify the imposition of its tax on everyone employed in Denver who earns $250 per month, regardless of where he may reside and knowing that many are nonresidents, on the basis that it is the 'Core City.'

"There is no formal organization of the "*Core City*, it has no fixed boundaries, nor is there any statutory or constitutional recognition of the concept. The very use of the term 'core' suggests that it is only *a part of a larger whole*. The *larger whole* is what is known as 'the metropolitan area,' the problems of which have been the subject of many legislative and constitutional proposals in the general assembly.

"The metropolitan area, at least for census purposes, in addition to Denver, consists of Arapahoe, Jefferson and Boulder Counties. It is common knowledge that residents of Douglas, Clear Creek, Park, Gilpin and Weld Counties commute to full-time jobs in Denver. Certain types of employment permit people to live at even greater distances and still work there to a 'sufficient' extent to earn $250.00 per month.

"The *metropolitan area* is inhabited by approximately fifty percent of the state's population and Denver, in turn, has almost fifty percent of the area's total.

"In view of the magnitude of the area and the population, it is most difficult to escape the conclusion that the imposition of the tax is not purely *local* concern, but is of state-wide concern.

"When the legislature authorized cities to impose *occupation* taxes it must be assumed that it was thinking of *occupation tax* in the traditional sense — a tax on the owners of businesses for the privilege of conducting various classes of business within the boundaries of the city . . . But it should be noted that in none of those cases were *employees* as such taxed and in none of them were the businesses subject to the tax situated *outside of the city*. To me this suggests that when a city attempts to encompass the

whole or even a substantial part of the state within its taxing program, it is of *state-wide concern*. In this connection it is interesting to note that Denver does not attempt to impose its sales tax on sales of merchandise made *within* Denver for delivery *outside* of Denver." (Emphasis by the Court)

Justice Kelley further points out that there are some twenty home-rule cities of like character with Denver, all of which "have financial problems almost as acute as those which prompted Denver to enact the ordinances approved by the Court." Since each has the same power as Denver, then other cities may follow suit with Denver, causing multiple taxation of a single salesman or employee in many or most of the cities of the State, and likewise, of course, in commerce. The Justice points out the impossibility of considering the matter in a vacuum, and that the effects of the tax must of necessity be highly non-local.

Thus, as held in the *Johnson case*, supra, "to concede the right to legislate upon such matters in the slightest particular must be to concede the right to legislate on all matters, and we would have a community of citizens representing one-third of the population of the state legislating for themselves upon all matters and not subject to the general legislation of the state."

Not only so, but they would legislate, as well, in a manner to impose a burden upon the remainder of the State, to render it tributary to Denver in a fiscal sense, which simply cannot be.

The Court concludes that there are three things which the People cannot do even by Constitutional amendment:

(1) free any portion of the state from operation of the constitution; (2) delegate to a charter convention the making of constitutional amendments; and (3) give a charter convention the power to prescribe jurisdictional duties of public officers with respect to state government as distinguished from municipal or city government. It concludes that if none of these things can be done by the people, then "*no portion of any one of them can be done*," so that "it is the duty of this court to promptly and emphatically call an immediate halt and retreat whenever it is in a proper manner brought to the attention of the court that the first step has been taken or attempted along the forbidden highway."

People vs. Max, 70 Colo. 100, 110, 198 Pac. 150, expressively affirms these doctrines, stating: "If the people cannot by statute or constitutional enactment, deny to any person 'due process of law' no more can they accomplish the same object by popular vote under the guise of recall of a court decision. The prohibition of the federal constitution is against the *state* itself. *What the state cannot do it cannot authorize one of its municipalities to do.*".

The Court continues: "Even by constitutional amendment, the people cannot set apart any portion of the state, in such manner that that portion of the state shall be freed from the constitution.' *People ex rel Elder vs. Sours*, 31 Colo. 369, 74 Pac. 167, 102 Am. St. Rep. 34. * * *" The Court argues that such a thing is impossible because:

> "If a city of Colorado be empowered by a vote of its citizens to determine when it will and when it will not permit the constitution to be enforced within its borders, it is thus freed from the fundamental law of the land and may set at defiance the whole power of

> the people of the commonwealth. It may enact its own constitution, establish its own courts of general jurisdiction, provide its own criminal code, *refuse to pay state taxes*, and do any and all things which a sovereign may do."

"If it is thought horrifying that a City should refuse to pay State taxes, then it is a matter of equal distress that a City presume to tax the State, the federal government, and the right of either to employ. Intolerable, too, is the presumption that the City levy tribute upon the citizenry of other and co-equal communities. This is not local in nature, and is impermissible in essence, and is Federally void.

The first attempts of Denver to pass an income tax were, for this among other reasons, put down in the case of *Denver vs. Sweet*, 138 Colo. 41, 329 P.2d 441, where, speaking of an overruled case giving the City power to regulate telephone rates, the Colorado Court said: "The thinking of that case has permeated some of the actions of our home rule cities to the point where today they think of themselves as being like medieval city-states with plenary powers which bar the state from any form of supervision or control of matters which later events show to be either matters of constitutional or statewide concern."

At page 48 of the same opinion, the Court rejects altogether that type of municipal thinking:

> "The United States Constitution provides for a national government with a federal system of *states*. All powers not expressly granted the federal government are reserved to the *states or to the people*. United States Constitution, Tenth Amendment. Colorado's

> Enabling Act, approved by the federal government when we acquired statehood, insured that our state will have a republican form of government. Enabling Act, Article 4. Clearly our federal system does not envisage as a part thereof city-states. It therefore follows that home rule cities can be only an arm or branch of the state with delegated power. That is the kind of power granted by Article XX." (Emphasis by the Court).

Decidely, then, no city may use Article XX to force the inhabitants of other cities to bear a part of its own municipal burdens, as a claimed tax for the privilege of commerce with it, within the framework of the State, without by so doing violating the basic precepts of republican form of government, required by the Constitution of the United States, and a pre-condition of Statehood under the Enabling Act.

Similarly, if Article XX be interpreted to permit the externalization into the area of matters of state-wide concern, then, as repeatedly point out by all Courts reviewing the matter, Article XX would of necessity be void.

Similar taxing attempts of the City of New York have been held by this Court to be void. Thus, in *Travis vs. Yale & Town Mfg. Co.*, 252 U.S. 60, 40 S. Ct. 228, 64 L.Ed. 60 (1919) where the State of New York endeavored to levy an income tax both upon residents and non-residents, but allowed certain exemptions to residents very much in parallel to the exemption discriminations made under the Denver ordinances this Court held that the tax was violative of Article IV, Section 2, of the United States Constitution: "The citizens of each state shall be

entitled to all the privileges and immunities of the citizens in the several states."

By extension, each citizen of Colorado is entitled to the same rights as each other citizen, a matter recently and clearly upheld by this Court in the case of *Lucas vs. General Assembly*, 375 U.S. 938, 84 S. Ct. 351, 11 L.Ed. 2d 270, one of the reapportionment cases, denying the right of the Colorado citizenry even by Constitutional Amendment to deprive persons of any area of their rights under the doctrine of Equal Protection enunciated in the Fourteenth Amendment. The requirement, then, that citizens of other cities in Colorado must in order to exercise their rights of citizenship in the State pay municipal to Denver is utterly impermissible.

Such attempts at municipalities to levy their taxes broadscale are now increasingly common. Accordingly, the City and County of San Francisco, structurally like Denver, a home rule City and County, attempted to impose by ordinance passed August 24, 1968, and purportedly effective January 1, 1969, a "license fee for the privilege of engaging in occupations, trades, or professions in the City and County of San Francisco by all non-resident persons employed by others." In an action brought by the surrounding counties, the action came before the Superior Court of California for the County of Sonoma in Action No. 60398, *County of Alameda, etc. vs. City and County of San Francisco*.

Many aspects of the case paralleled the Denver situation, including the argument of whether or not the matter was an income tax, and whether or not a municipality might levy one. The problem of the right of the City and

County to levy tributary taxation was, however, specifically considered, and was rejected:

> "It is contended that this a fair tax since services are supplied by the City and County of San Francisco to the non-resident commuters for which they should pay. It is also argued that in determining whether or not this ordinance is unreasonable one should look to the entire tax structure of the City and County of San Francisco. One, in considering the tax structure, should not only consider the tax structure of the City and County of San Francisco, but should look at the entire tax structure of the community. It is apparent that the commuter pays for the same services complained of in his own county. To again tax him for these services in San Francisco would be to impose an undue burden upon the commuter. The conclusion has been reached that since the commuter constitutes approximately 20% of the complete population of San Francisco, that 20% of the tax load should be allocable to the commuter. This, of course, is a fallacy since the commuter only spends his working hours within the confines of San Francisco and does not take into consideration the fact that much of the tax burden is incurred not just by the worker, but by the families of the worker, so that a mere numerical percentage does not reflect a true reasonable apportionment of the use of the services as between resident and non-resident."

The Court holds there, as contended here, that even under home rule chartering, such taxation is not of local concern but is, as here urged by Mr. Justice Kelley, of state-wide concern, stating that "since the commuter tax is directed solely against non-residents it would transcend

the municipal affairs of San Francisco and is a matter of state-wide concern."

B. THE TAX SOUGHT TO BE LEVIED IS NOT AN EMPLOYMENT TAX, NOT A PRIVILEGE TAX AND NOT A LOCAL TAX OF ANY KIND AT ALL, BUT IS AN ATTEMPT, BY WAY OF AN INCOME TAX, TO RESTRICT THE FEDERALLY PROECTED AND BASIC *RIGHT TO EARN A LIVELIHOOD.*

It is euphemistically claimed that the taxes involved here are "occupational privilege taxes". However, they do not apply to persons earning $3,000.00 a year or less from a single employment. Moreover, the tax applies cumulatively to persons who are already licensed, as well by Denver as by the State and the Federal government, to ply their occupations and employments in Denver, and who in many cases pay Denver already quite dearly for that right. As held in the *San Francisco Case*, such a tax is not a license or privilege tax at all:

> "It must be determined that this is an income tax and not a license fee on employment. The tax cannot be a tax on employment since it does not license all employment of the same class. It exempts residents and only taxes non-residents. Thus it is directed at the individual income of the non-resident and not at his employment. Under its terms two persons performing the same duties of employment, one would be taxed and the other would not. *Since it exempts non-resident employees earning less than* $4,000.00 *annually, it is directed at income and not employment.*" (Emphasis supplied).

Since the Denver tax, even if urged to apply to residents of Denver as well as non-residents, also exempts persons earning under $250.00 a month, though including persons having far less than that connection with Denver, it is directed at income and not employment.

The Colorado Supreme Court expressly holds (Appendix A-1) that Denver cannot levy an income tax. Accordingly, it has invalidated, unanimously, Ordinance 234. It has permitted the other and invidious income tax to stand, and so it has violated equal protection under the Fourteenth Amendment.

Each of the challenged taxing ordinances prohibits the conduct of business or engagement in employment or making of a livelihood, unless there is paid to Denver monetary tribute in the amount of $2.00 monthly for each person conducting a business, plus $2.00 for each employee in that business, and unless each employed person, regardless of place of residence, with the peculiar $250.00 monthly exemption mentioned above, pay $2.00 for his personal right of employment, required to be withheld by his employer from his wage.

Article II, Section 3, of the Colorado Constitution provides:

> "All persons have certain essential and inalienable rights, among which may be reckoned the right of enjoying and defending their lives and liberties; of acquiring, possessing, and protecting property; and of seeking and obtaining their safety and happiness."

Like guarantees inhere in the guarantee of due process of law, explicit in Article II, Section 25, of the Colorado Constitution, and the due process and equal protection

provisions of the Fourteenth Amendment to the Constitution of the United States.

Accordingly, receipt of income or earnings is not a privilege, but is a *right* that belongs unequivocally to every person, citizen or non-citizen alike. Realization and receipt of income is not a *privilege* which may be taxed as such. The very claim that it is a "privilege" is a deprivation of equal protection and of due process.

It is quite true that, absent a constitutional restriction to the contrary—and such a prohibition against municipal income taxation exists in Colorado and is upheld under the decisions in this very case (Appendix A-1)—a legislative body can characterize any privilege as a taxable privilege, and tax it by means other than an income tax, as for example by an "occupational license tax". However, NO LEGISLATIVE BODY MAY CHARACTERIZE ANYTHING A TAXABEE PRIVILEGE UNLESS IT IS FIRST A *PRIVILEGE*. It is not permissible to claim that which is in law a "right" to be a "privilege" for the purpose of taxation.

Denver, without these measures, levies and can levy occupational license taxes. Denver, in these measures, does not purport to license; does not purport to regulate; does not purport to use the police power in any manner. Forthrightly and unequivocally, each measures declares in terms that it is a "revenue measure only", and each proclaims that it seeks to impose upon persons outside Denver, who make use of Denver municipal facilities, though paying for like facilities in their own places of residence, facilities similarly used by Denver residents, a burden of supporting Denver expenses as well as the

communal and cognate expenses in their own particular places of residence.

Jack Cole Company vs. MacFarland, Commissioner, Tenn. 237 S.W.2d 453 (S.Ct., Tenn., 1960) is directly in point. Suit was instituted to recover a tax and penalties paid under protest by complaint who transported freight in interstate commerce in Tennessee. The State claimed the tax was upon the "privilege" of being in receipt of and realizing net earnings in the state. It was held there was no such "privilege" involved; that the tax was on net earnings; and that it was an income tax outside the powers of the legislature, which had no income taxing authority.

The opinion states the matter succinctly:

"The defendant contends that the tax is a privilege tax because the Legislature has designated the receipt or realization of earnings or income as a privilege. Defendant cites numerous cases supporting the contention that the Legislature can name anything to be a privilege and then tax it.

"It cannot be denied that the Legislature can name any privilege a taxable privilege and tax it by means other than an income tax, *but the Legislature cannot name something to be a taxable privilege unless it is first a privilege.* (Emphasis supplied).

"In the present case the statute itself provides that the tax shall be construed as a tax on the privilege of carrying on a business in Tennessee, but expressly provides that the tax shall be upon the privilege of being in receipt of or realizing net earnings in Tennessee, which, it appears to us, is an income tax not

authorized by Article II, Section 28, of the Constitution above referred to.

"*Realizing and receiving income or earnings is not a privilege that can be taxed.* (Emphasis supplied).

"'A privilege is whatever business, pursuit, occupation, or vocation affecting the public, the Legislature chooses to declare and tax as such.' *Corp. et al. v. Fort*, 170 Tenn. 377, 385, 95 S.W.2d 620, 623, 106 A.L.R. 647.

"'Privileges are special rights, belonging to the individual or class, and not to the mass; properly an exemption from some general burden, obligation, or duty; a right peculiar to some individual or body.' *Lonas vs. State*, 50 Tenn. 287, 307.

"SINCE THE RIGHT TO RECEIVE INCOME OR EARNINGS IS A RIGHT BELONGING TO EVERY PERSON, THIS RIGHT CANNOT BE TAXED AS A PRIVILEGE. (Emphasis supplied).

"It results that we find no error in the decree of the Chancellor holding the Act in question invalid and it is affirmed."

It is difficult to see what "privilege" Denver confers vis-a-vis employment. It alleges in the ordinances that it taxes to require a contribution of persons employed in Denver to the maintenance of the public ways and places of the City. However, all such public ways and places in any municipality are available, *as a matter of right*, to all persons, citizens or aliens, and residents or non-residents alike. *People vs. City and County of Denver*, 90 Colo. 598, 10 P.2d 1106, states flatly: "The streets and highways of Denver are public highways of the state. Every citizen of

the state of Colorado or of the United States has a **RIGHT TO TRAVEL UPON THEM.** There certainly is no express provision in Article XX that makes the streets of Denver merely local highways for the use of the residents or citizens of Denver alone. The people of the state, as stated have the *undoubted right* to use them as have citizens and residents of other states; * * *" (Emphasis supplied).

Similarly, in *People of the State of Colorado vs. Nothaus*, 147 Colo. 210, 363 P.2d 180 (1961), the Colorado Court held invalid the motor vehicle financial responsibility act of Colorado, requiring the posting of insurance or bond as a pre-condition to driving upon the highways of the State, holding that the use of the public ways and places of the state is a *fundamental right* of every citizen. The court in this connection said: "The term property, within the meaning of the due process clause, includes the right to make full use of the property which one has the *inalienable right to acquire.*"

The Court remarked further: "Every citizen has an inalienable right to make use of the public highways of the state; every citizen has full freedom to travel from place to place in the enjoyment of life and liberty. The limitations which may be placed upon this inherent right of the citizen must be based upon a proper exercise of the police power of the state in the protection of the public health, safety, and welfare. Any unreasonable restraint upon the freedom of the individual to make use of the public highways cannot be sustained."

By direct statement included in each Ordinances 232 and 233, neither is a police measure. Each is a measure for revenue purposes only. Each seeks to exact revenue from persons non-resident in the City, for purely muni-

cipal purposes, for the exercise of an absolute and inalienable right, the right to earn money and the right to use of the public highways. Neither is local in purpose; neither has any relation to the police power; each is beyond the matter of local concern; and each is void as extrapotential insofar as concerns the City and County of Denver.

State of Alaska vs. Baker, 64 W.2d 207, 390 P.2d 1009 (Wash., 1964) involved the question whether the Alaska Business License Tax was basically a revenue measure imposing a tax, permitted to be imposed upon government contractors on government reservations, or a licensing or police measure. It was held to be an income tax. The Court concluded: "If revenue is the primary purpose and regulation is merely incidental the imposition is a tax; while if regulation is the primary purpose the mere fact that incidentally a revenue is also obtained does not make the imposition a tax."

At bar there is professedly a revenue purpose only, and no regulation involved. Hence, there is no "privilege" involved, but simply taxation upon an absolute right, an income tax if any tax at all, barred by Colorado law, but certainly a power far beyond local concern and hence, if allowed by Denver to be extra-laterally levied, a violation of Federal Constitutional law.

In like manner, The Supreme Court of the United States has held in *Howard vs. Commissioners*, 344 U.S. 624, 73 S.Ct. 97, L.Ed. 617, that the City of Louisville "occupational tax" or "license fee" was an income tax, that ordinance requiring annual license fee for the privilege of engaging in business activities, which license fee was measured by one per cent of (a) all salaries, wages, or other compensation earned by every person in the city,

and (b) net profits of all businesses conducted in the City. This Court held that the tax, within the meaning of the Buck Act, was an income tax, being a tax measured by net income, gross income, or gross receipts.

The Denver tax almost entirely exempts persons earning less than $250.00 monthly from a single employer. It cannot, therefore, be a tax on the privilege of earning, as claimed, for it is quite as much a privilege to earn $250.00 as to earn $251.00. Moreover, the non-resident is taxed, regardless of how much of his time is involved in Denver, if he earns $250.00 anywhere, but is involved at any time in employment in Denver. Hence, he may earn $5.00 in Denver, but $251.00 during the month, and hence is subject to $2.00 monthly tax to Denver upon his $5.00 occupation, while one who earns $250.00 in Denver is exempt entirely, a grotesquerie which violates equal protection of the laws, and also brands the tax as anything but an "occupational privilege tax."

C. THE TAX CANNOT BE VALID, SINCE UNDER THE EXISTING REQUIREMENTS OF STATE LAW, AND THE EXEMPTIONS WHICH WOULD HAVE TO BE MADE THEREUNDER, ITS LEVY UPON ANYONE WOULD VIOLATE THE RIGHTS OF EQUAL PROTECTION OF THE LAWS.

The State of Colorado taxes in the insurance industry by a percentile levy. In 1963 CRS 72-1-14, the State Statutes provide:

> "(e) The taxes aforesaid shall constitute all taxes collectible under the laws of this state against any such insurance companies, *and no other occupation*

tax or other taxes shall be levied or collected from any insurance company by any county, city, or town within this state, but this chapter shall not be construed to prohibit the levy and collection of state, county, school, and municipal taxes upon the real and personal property of such companies."

If the legislature prohibits expressly the levy of any "occupational tax" by a municipality upon the insurance industry, how, within the requirements of equal protection, is it possible to permit the City to impose such levies upon other industries equally heavily taxed by the State without violation of equal protection of the laws? If the City can ignore the State exemption, how is it possible to claim that this is a local situation to Denver, Denver then formulating the legislative policy for the state in contrariety to the express declaration of the General Assembly, and in violation of the republican governmental requirement of the Constitution and of the Enabling Act?

D. THE TAX CERTAINLY OFFENDS THE PRIVILEGES AND IMMUNITIES AND COMMERCE CLAUSES OF THE CONSTITUTION OF THE UNITED STATES.

To argue the problem of the effects upon commerce of a tax such as the present is outside the limitations of a jurisdictional statement. However, not even the fundamental of "minimum contacts" are observed by the ordinances, which impose the tax upon any employer "having any situs direct or transitory for any period of time whatsoever in the City and County of Denver" and upon any employee of any such employer performing any function in Denver, no matter how transitory. This is an intolerable

burden upon commerce, and in it's very statement it is believed and urged, demonstrates the enormity of the effects upon commerce and the necessary Federal Question.

Denver is an emporium of goods, services, and money for an eleven-state area. Almost everyone having any basic contact in that area at some time or other has a fixed or transitory situs for some period of time in Denver. Denver claims a right to $2.00 a month per employer and for each employee of such employer, as well as $2.00 a month more from each employee in every such circumstances. Denver, therefore, as a great commercial city, stands as a highwayman demanding tribute in the channels of commerce; which under the Constitution of the United States must be free and open; and this is not permissible.

The invalidity of such a tax is clearly demonstrated by many decisions, State and Federal one of the most recent of which is *Oklahoma Tax Commission, etc. Braun Paymaster, etc.*, 420 P.2d 894, holding such contacts as described too casual exist to permit levy of an income tax by a state upon a firm having a single soliciting agent within the State. If this is too casual, then the Denver standard reaches the depths of fiscal libertinism.

We have before cited the actions of this Court in *Travis vs. Yale and Towne Mfg. Co.*, supra, followed by the California Courts in the San Francisco Case to like effect.

E. THE TAX HERE INVOKED SIMPLY A CAPITATION OR HEAD TAX AND INSOFAR AS IT CONCERNS NON RESIDENTS, THERE IS NOT THAT CONTACT WITH DENVER WHICH PERMITS THE LEVY OF SUCH A TAX

We have adverted before to the opinion of Mr. Justice Kelley (Appendix A 51). We call the attention of the Court to a most apt quotation from him, since as he points out insofar as concerns non residents, the tax sought to be imposed is a capitation, a head tax, for which no legal predicate exists:

> "There is respectable authority for the proposition that a 'head tax,' such as we have here, is invalid when the attempt is to impose it on nonresidents. A statement which appeals to my sense of reason is found in *Donahue v. Richards*, 38 Me. 379, *Lord Company and City of Johnstown*, 100 Pa. 423, 118 A. 2d 687. It reads: 'The tax bears none of the incidents of an occupation tax which is a flat rate levy measured by the assessed value of a man's occupation. Consequently, in a true occupation tax the amount of the levy varies with the assessed value of a particular right of employment. Here, no distinctions among occupations are made, a fixed ten dollar levy falling upon all non residents. The use of the word 'occupational' adds nothing to the levy and does not conceal its real nature as a capitation tax.
>
> 'Capitation or poll taxes are taxes of a fixed amount upon all persons, or upon all the persons of a certain class, within the jurisdiction of the taxing power, without regard to the amount of their property or the occupations or business in which they may be engaged.' (A.R.B. No. 38, p. 10, *Hooker v. Gordon*

No. 40, p. 122 (4th ed. 1924). The tax is imposed because of the protection which a governmental unit affords to persons residing therein, and is designed primarily to require contribution from all residents for the services rendered them by the taxing authority. Consequently, per capita, capitation or head taxes can be imposed only upon residents of the particularly subdivision since residence alone furnishes the contact necessary to render a person amenable to the direct levy."

"This case is still the law in Pennsylvania. * * *"

SUBSTANTIALITY OF GROUNDS.

The City and County of Denver is one of some thirty major cities in the United States constituting the principal city in a substantially populated area, surrounded by dense suburban populations, and having many commercial interconnections with surrounding cities, both in its own and immediately surrounding states.

Denver is a home rule City, operating as a City and County under a constitutionally authorized charter, provided by Article XX of the Colorado Constitution.

That Constitutional Provision has been much litigated, and has been challenged as offensive to the Fourteenth Amendment to the Constitution of the United States and to the requirements of Republican Form of Government under the Constitution of the United States, and as expressly required by the Enabling Act of the State of Colorado, a Federal Statute. In numerous cases, the Supreme Court of Colorado has held that if general sovereign powers to do matters and things not purely local in effect

but of extra-lateral and statewide effect were attempted to be given the City and County of Denver by the said Article XX, then Article XX would be void as violative of the Constitution of the United States and of the Enabling Act.

This Court has sometimes held that matters of state constitutional provisions and their interpretation are not substantial federal questions, but the matter here is not one of interpretation of the State Constitution, but conversely an allegation, as in the *Lucas Case*; that the *State Constitution is itself unconstitutional* as applied here, permitting the development of a City-State or an imperium-in-imperio.

The Supreme Court of Colorado has held that such result would be the case if the present Constitution were interpreted to permit the City and County of Denver to levy an income tax, and accordingly has stricken the Denver Ordinance, No. 234, permitting the levy of an income tax or earnings tax, holding it to be unconstitutional and void.

The Supreme Court, by a highly divided vote, and by a Court differing sharply in views and presenting, among seven judges, five separate and distinct opinions has upheld Ordinances 232 and 233, relating to claimed "occupational privilege taxes" admittedly levied cumulatively of existing licenses, and not for licensing or regulatory purposes but for purposes of revenue only.

Those measure purport to prohibit the exercise of the right to earn a livelihood in Denver without payment, and purport to require persons outside of Denver and with less than minimal contacts with Denver to pay these taxes. There is thus an extension by Denver of taxing jurisdic-

tion, without representation, far beyond the boundaries of Denver and far beyond the area of local concern. There is a tax subjection to Denver.

More than two dozen other cities exist in the State which must have identical rights if Denver is permitted to have them, and as pointed out in many of the opinions, these cities would exercise such rights.

More than 20,000 employees of the United States have their occupations in Denver, and as argued by the City, may not be employed and are not privileged to work without levy of tribute by Denver. The United States, the State of Colorado, and the local School District have all refused to withhold the required taxes or to pay or to remit them.

At least one major industry, Insurance, by the terms of state statute is entirely exempt from any local "occupation tax" of any kind.

Denver is a major commercial, goods distribution, and service and monetary center for almost one-quarter of the United States. Commerce and trade are seriously hampered by impositions of the kind here involved. Similar attempts to tax extra-laterally by the City of New York and by the City and County of San Francisco have been held to be invalid.

The major constitutional problems now facing the United States derive, without exception, from the growth and proliferation of the modern City. This Court has uniformly considered these problems, whatever the form of their manifestation, whether in general questions of civil right and segregation, questions of right to vote and ex-

tension of franchise, and the like to present substantial federal question. The fundamental question here presented is the right of the City; for maintenance of its urban functions, to tax beyond the physical limits of the City, here by capitation or head tax, disguised as an "occupational" tax, but having none of the indicia thereof, and to levy tribute upon persons dealing in or with the City in course of commerce from other parts of the same state or from other parts of the United States and hence in interstate commerce.

The serious interstate commerce aspects of the matter have been pointed out in Amicus Briefs by the Airlines and by the Airline Pilots Association.

It is most respectfully submitted that the questions here are and have been recognized to be, beyond local constitutional problems, problems involving the basic constitutionality of the structure of the City and County of Denver, if it be thus allowed extra-laterally to tax. The matters have been resolved only by fragmented vote of the State Supreme Court, 4 to 3, and in five opinions. The matters are of overwhelming basic importance, the questions of the permissible and impermissible in municipal finance, and the interaction of municipal taxation with State and Federal rights becoming one of increasingly paramount concern.

We most respectfully submit that the questions here are the basic questions which must necessarily underly constitutional structural problems as they will come before this Honorable Court and develop to fruition and resolution within the next decade.

We submit that the problems already manifest in

New York, in California, and in Colorado must be faced and met throughout the nation, and that the matter of the relation between State Government, Federal Government, and Municipal Government—the latter by reason of its growing size seeking to act as a third constitutional force and independently of State authority—must basically be resolved to retain the integrity of the Constitutional division of power now implicit and explicit in the scheme vesting sovereignty respectively in the United States, the Several States, and the People, but not as to matters of non-local concern in the Cities.

Whatever their problems—and they are many—the Cities do not possess that quantum of power; and, it has been held, under the present Constitution of the United States may not be granted it or assume it. This is a Federal Question which, we submit, is as substantial as any which can come before this Honorable Court which, we respectfully submit, should therefore consider the matter upon its substance.

In point of substance there are many matters which would require more ample presentation than made in this Jurisdictional Statement. It is believed, however, that the area is one of primary Federal Constitutional import, and it is, therefor, presented to the Court.

Most respectfully submitted,

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APPENDIX A-1

MR. JUSTICE DAY delivered the Opinion of the Court.

Two writs of error are involved herein. They are directed to two determinations entered by the trial court in a declatory judgment suit filed in Denver district court by several corporate and individual plaintiffs for themselves and as representatives in a class action. The City and County of Denver and the individual city office-holders named as defendants and appearing herein both as plaintiffs and defendants in error will be referred to collectively as Denver. The plaintiffs below will be referred to as such. They too are here as both plaintiffs and defendants in error.

Plaintiffs challenge the legality of three city ordinances enacted by the Denver City Council. Two of them —Ordinances No. 232 and No. 233—already are in effect and have been since January 1, 1969. One—Ordinance No. 234—is by its terms to become effective on March 31, 1969. A declaration of invalidity as to all of them was sought by plaintiffs, with the prayer that a permanent injunction issue restraining Denver from enforcing any or all of the ordinances. Judgment of the court was entered granting relief as prayed only as to Ordinance No. 234, Series of 1968. And to this Denver brought writ of error. The court decreed that Ordinances No. 232 and 233 were valid and enforceable and entered judgment dismissing the complaint as to those two ordinances. To this plaintiffs brought writ of error.

We elected to consolidate both writs of error for oral argument. We consolidate the cases in this opinion, sep-

hearing, however, the ordinances as affected thereby, and the disposition of the several issues involved.

We state at the outset that what is not involved or intended to be covered in this decision are are rights, exemptions and immunities of the individual employers and employees as they may believe their respective positions to be under the definitions in and the terms of the ordinances. This is by reason of the stipulation of the parties that:

> "Plaintiffs, in their said representative capacity, do not act with relation to any special circumstance or matters with relation to the subject ordinances, or any of them, as they may affect particular individuals * * *."

We further add that with reference to the myraid administrative questions which may arise as to the named plaintiffs in their individual capacities or as to other individuals similarly situated relating to their special circumstances under the ordinances held to be valid, there is provided in these ordinances administrative procedures which must be exhausted before review may be had in the courts.

Also we further state that *what we do hold herein* is limited as provided in the stipulation to the "questions of power, jurisdiction and authority (of Denver) to pass and enforce the several ordinances and the taxes and impositions asserted to be made by them."

SUPREME COURT NO. 23940

THE QUESTIONS AS TO ORDINANCE NO 234

This ordinance is entitled "Earnings Tax." We need not summarize its provisions nor analyze them. Denver concedes that it is an income tax, and further admits that if we were to adhere to a 1958 decision of this court it is an invalid ordinance under our holding in *Denver v. Sweet*, 138 Colo. 41, 329 P.2d 441. In the *Sweet* case this court held that article X, section 17, of the Colorado constitution vests exclusive non-delegable power in the General Assembly to levy income taxes and that Denver was therefore without power to enact an ordinance imposing an income tax. Denver takes the unequivocal position that this court was wrong in *Sweet* and urges—yea pleads vehemently—in its argument that we overrule that decision.

Denver reiterates the arguments now that were presented in the *Sweet* case, plus advancing its reasons as to why it believes the decision was erroneous. On the other hand, plaintiffs present detailed and lengthy arguments as to why *Sweet* was and is a correct decision. We decline to reargue or rediscuss the several issues raised in *Sweet*. We adhere to the *Sweet* decision under the doctrine of stare decisis.

What we consider to be a rather general statement of the purposes of stare decisis is to be found in *Creaca v. Industrial Commission*, 148 Colo. 429, 366 P.2d 384, wherein this court stated:

> "* * * Under the doctrine of stare decisis courts are very reluctant to undo settled law. This doctrine has

for its object, uniformity, certainty, and stability of the law and the rights acquired thereunder. * * * "

That the doctrine of stare decisis is firmly embedded in Colorado law may be gleaned from the latest pronouncement of this court on the subject, *In re Interrogatory of the Governor*, 162 Colo. 188, 425 P.2d 313, wherein we stated:

" * * * We have, of course, examined carefully our earlier decisions relating to the matter * * * In our opinion, the result obtained in each of those cases is 'right' and not 'wrong.' But even if the results be a so-called 'wrong' decision, we would not be justified in overruling those cases unless there be compelling reasons for so doing. * * * "

Significantly applicable to the case at bar are the cases of *People v. McPhail*, 118 Colo. 178, 193 P.2d 315, and *Wolf v. People*, 117 Colo. 219, 187 P.2d 926.

In *Wolf v. People*, *supra*, this court stated:

" * * * We are not unconscious of the fact that that rule (stare decisis) is frequently ignored, with the general approval of the courts, for certain definite and often valid reasons. Among these are doubtful decisions handed down by closely divided courts and recent decisions establishing rules not yet firmly embedded in the juri-prudence of the jurisdiction. No such reason can possible exist here. * * * "

In the *McPhail* case, *supra*, we find the following apt language:

"When a question arises here which has been before this court in a case clearly in point, has been ably

> argued by competent counsel, received our careful consideration, been unequivocally decided, and that decision has stood unchallenged over a long period of years, we have no disposition to reopen the subject while constitution and statutes remain unaltered. Such is the situation now confronting us."

The criteriat set out in those cases point up that the doctrine of stare decisis should be applied to *Sweet*. That case was obviously a contested one, with both sides arguing ably and persuasively. The arguments raised by Denver at this time are basically those presented to our court in the *Sweet* case. The *Sweet* opinion was an unanimous decision of the court, with one judge not participating. It has been the law for eleven years. There have been no constitutional changes relating to the question. There have been no intervening circumstances indicating a reversal except the need of Denver for increased revenue, which factor existed at the time of *Sweet* and which factor now is not sufficient to cause the abandonment of stare decisis.

More succinctly, the *Sweet* opinion has now become a basic part of Colorado jurisprudence. In these circumstances any changes deemed necessary should come from the legislature or from the people by their exercise of the power to initiate amendments to the constitution. This guiding principle we set forth in *Smith v. People*, 120 Colo. 39, 206 P.2d 820, as follows:

> "The only answer to this question is that the law as declared and interpreted over many years is well established, and our function is to declare the law as we find it. If a change so long established

Arguments much the same as are advanced here were presented in *Englewood v. Wright, supra*, and disposed of in that decision. In that case the power of Englewood to impose an occupational tax was conceded. Those who objected to it argued that the tax was an income or property tax improperly levied; that the classifications were arbitrary; that the ordinance permitting imposition of a jail sentence or fine for non payment was in violation of the constitutional guarantee against imprisonment for debt. All of these contentions were rejected by this court, then, and we do so now. The terminology aside, it is clear that the Denver ordinance is similar to the Englewood tax. The *Englewood* case is strong precedent for the validity of the tax sought to be imposed by Denver's "Business Occupational Privilege Tax." Here again the doctrine of stare decisis, on which municipalities have extensively relied in the imposition of similar taxes, dictates that the four cited cases have settled the law and set at rest constitutional questions raised herein.

THE QUESTIONS ON ORDINANCE NO. 233

This ordinance is designated "Employee Occupational Privilege Tax." It declares "the performance of service within Denver by an employee for an employer as herein defined for any period of time in a calendar month for wages as herein defined is the exercise of a taxable privilege * * *." It imposes also a tax at the rate of $2 a month for each and every month for which such employee is for any period of time so employed. Exempted from the tax are those whose compensation for such services is less than $250 per calendar month.

It is argued by the plaintiffs that this is a flat tax on income. We are not persuaded that this is true. The tax is limited to an employee engaged in an occupation,

i.e., one who is performing such service for an employer, as defined, within Denver for any period of time in the calendar month upon a salary, wage, commission or other compensation basis. Other monetary earnings, no matter how substantial, from interest or investments or the like (all of which would be "income") are not taxed.

It is further contended that the four cases previously cited involving the occupation taxes levied in Grand Junction, Glenwood Springs, Cortez and Englewood are limited to persons engaged in business or self employment and are not authority for taxing individuals working for others. We detect no valid limitation in the rule pronounced in those decisions just because the cities involved therein did not extend their taxes beyond the limits noted in their respective ordinances.

It is true that the precise issue concerning the authority to tax everyone gainfully employed was not before the court in any previous case, but such taxes are not novel or unheard of, and in other states the taxpayers have been as ardent in their protests and objections as the plaintiffs herein, only to find that similar ordinances to that under consideration here have been held valid. For example, in *Mangler v. City of Allentown*, 410 Pa. 315, 189 A.2d 264, an annual tax of $10 upon each individual, resident and non-resident alike, engaged in any occupation within the corporate city limits of Allentown, Pennsylvania, was upheld. The Pennsylvania Supreme Court said:

> "It is our conclusion that the tax imposed was purely an Occupation Privilege Tax despite the fact that it does not asses a varying levy according to the nature of the employment. It taxes the *privilege* of all to engage in occupations within the municipality's

territorial limits. This power was given by the legislature under the Act of 1947, supra. Subsection A thereof, authorizes the imposition of taxes on 'persons, transactions, occupations, privileges, subjects and personal property within the limits of such political subdivisions.' * * *".

Colorado has a similar statute delegating like authority to statutory cities. C.R.S. 1963, 139-75-1(3) and 139-78-3(2). Home rule cities are not limited to legislative grants of authority and at the very least have every power which the legislature may delegate to cities of lesser class. For other cases on occupation taxes an individual employees see *City of Louisville v. Sebree*, 308 Ky. 420, 214 S.W.2d 248; *Estes v. City of Gadsden*, 266 Ala. 166, 94 So.2d 744.

Persuaded as we are by the reasoning in courts of other jurisdictions, we nevertheles also hold that the four cases previously cited as upholding the validity of Ordinance No. 232 are also controlling as to Ordinance No. 233. The exemption for those who receive less than $250 a month income is a concrete way of exempting those who perform only minimal services within Denver. As so viewed, the classification is not arbitrary and is reasonable. The test quoted with approval from *McCarty v. Goldstein*, 151 Colo. 154, 376 P.2d 691, and *Champlin Refining Co. v. Cruse, Director of Revenue*, 115 Colo. 329, 173 P.2d 213, was most recently restated in *District 50 Metropolitan Recreational District v. Burnside*, Supreme Court No. 22140, announced December 9, 1968, ... Colo. ....., ... P.2d ....., as follows:

"Equal protection in its guaranty of like treatment to all similarly situated permits classification which is reasonable and not arbitrary and which is based

upon substantial differences having a reasonable relation to the objects or persons dealt with and to the public purpose sought to be achieved by the legislation involved."

COLLATERAL ISSUE

It is argued that the portion of the ordinance which requires an employer to withhold the employee's tax from the employee's wages places such a burden upon the employer as to be confiscatory and constituting the taking of property without due process of law. It is now universally recognized that there is no constitutional prohibition against such imposition upon employers who must withhold state and federal income taxes. This is also true of the requirement that the oil industry collect and pay the gasoline tax. This should be answer in itself to this argument. More specifically, however, we find the language in *Rinn v. Bedford*, 102 Colo. 475, 84 P.2d 827, a complete answer to this argument:

> "We consider next the question whether the act may lawfully require the plaintiff as an attorney at law to collect the tax from those for whom he himself performs services. The argument that he is thereby constituted a collector of taxes against his will, and that the compensation provided for the collection is inadequate and confiscatory, must fall, for there is no distinction in principle between such collection and the collection, for instance, of a gasoline tax, which is collected by the seller from the purchaser as part of the purchase price and thereupon turned over to the government. * * *"

The judgment of the trial court holding invalid Ordinance No. 234 and the injunction issued restraining and

prohibiting the city from imposing or enforcing the tax provided thereby is affirmed.

The findings of the court holding Ordinances No. 232 and No. 233 valid and the judgment dismissing the complaint as to those two ordinances are affirmed.

MR. CHIEF JUSTICE McWILLIAMS, MR. JUSTICE PRINGLE and MR. JUSTICE GROVES specially concurring.

MR. JUSTICE HODGES, MR. JUSTICE KELLY and MR. JUSTICE LEE concurring in part and dissenting in part.

APPENDIX A-2

MR. CHIEF JUSTICE McWILLIAMS specially concurring.

I concur in the majority opinion as authored by Mr. Justice Day. However, I would like to add a few observations of my own.

Nobody apparently likes to pay taxes, be it with or without representation. However, it should be remembered that courts do not enact tax laws nor are they concerned with the wisdom of any tax law. Hence, as concerns the instant controversy, the *wisdom* of any of the three taxing ordinances here under attack is not a matter to be passed upon by us. That particular matter has been resolved, at least for the time being, by the People of the City and County of Denver, acting through their elected representatives. The *only* issue in the present controversy to be resolved by us concerns the *power* of the Denver City

Council to enact the three taxing ordinances with which we are here concerned.

This court has now *unanimously* upheld the power of Denver to enact the so-called occupational tax as it relates to employers. In my opinion no other result could be reached on this phase of the case unless we overrule not one, but four, prior decisions of this Court which have upheld similar taxing ordinances in Englewood, Glenwood Springs, Grand Junction and Cortez.

Notwithstanding the fact that this Court has now unanimously upheld the so-called occupational tax as it relates to employers, the Court has by only a 4-3 vote upheld the so-called occupational tax as it would apply to employees. I for one cannot see how the occupational tax is, on the one hand, *valid* when applied to employers, but somehow *invalid* when sought to be applied to employees. In other words, it is difficult for me to see how the occupational tax is truly an *occupational* tax when applied to employers, but somehow becomes an *income* tax when sought to be applied to employees. The differences in these two taxing ordinances are simply not such as would justify upholding one, and striking down the other. In my view the employers and the employees in this connection are in the same boat—the occupational tax is either *valid* as to both, or *invalid* as to both.

As concerns the so-called earnings tax, this Court on the basis of *Denver v. Sweet, supra,* has now *unanimously* declared it to be invalid. I agree, though with some reluctance. To explain, in my opinion the *result* reached in *Denver v. Sweet, supra,* is wrong and the *reasoning* contained therein is to me, at least, unconvincing. As I see it, the rule of *Denver v. Sweet, supra,* represents an un-

warranted impingement upon the broad powers constitutionally vested in the Home Rule cities. Though in my view I am not *bound* to follow the rule announced in *Denver v. Sweet*, *supra*, for the reasons set forth by Mr. Justice Day I feel however that I *should*, and I now *do*. It is on this basis that I concur in the determination that the earnings tax should be declared invalid.

Mr. Justice Pringle has authorized me to state that he concurs in the majority opinion authored by Mr. Justice Day and also concurs in this specially concurring opinion.

APPENDIX A-3

MR. JUSTICE GROVES specially concurring:

I concur in the majority opinion believing that thereby I do not indicate that I would have concurred in the opinion in *Denver v. Sweet*, 138 Colo. 41, 329 P.2d 441.

APPENDIX A-4

MR. JUSTICE HODGES concurring in part and dissenting in part:

I concur with the majority opinion in affirming the judgment of the trial court as to the invalidity of Ordinance No. 234 imposing the so-called "earnings tax for general revenue purposes." I likewise concur with the majority in affirming the judgment of the trial court upholding Ordinance No. 232 which imposes the business and occupational privilege tax.

However, I respectfully dissent from the majority opinion insofar as it upholds the validity of Ordinance

No. 233 which imposes a so-called "Employee Occupational Privilege Tax" of $2.00 per month. Regardless of the name affixed to this tax, it is in my view an income tax. Therefore, it is not within the power and authority of the City and County of Denver to enact. *Denver v. Sweet*, 138 Colo. 41, 329 P.2d 441.

The majority opinion cites *Englewood v. Wright*, 147 Colo. 537, 364 P.2d 569, *Ping v. City of Cortez*, 139 Colo. 575, 343 P.2d 657, *Jackson v. Glenwood Springs*, 122 Colo. 323, 221 P.2d 1803 and *Post v. Grand Junction*, 118 Colo. 434, as the previous pronouncements of this court which purportedly uphold the validity of Ordinance No. 233. An analysis of these cases, however, reveals that each one involved the imposition of an occupation tax on a business, or, in other words, the privilege of conducting a certain business or occupation. In each case, the tax was upheld as a lawful occupation tax on the privilege of conducting certain named businesses or occupations within a municipality. As pointed out in *Englewood*, *Ping*, *Jackson*, and *Post*, the controlling element of an occupational privilege tax is the presence in the municipality of a business or occupational endeavor, project or enterprise. It is this thing itself that is subject to an occupational privilege tax. But, the imposition of a tax on an employee of the business because he earns more than $250 per month for services rendered to an employer within the municipality, is to impose a tax not on a thing, or a privilege, but on the personal right of an individual to earn an income by the performance of services for his employer.

The three cases from other jurisdictions referred to by the majority as supporting this type of tax are distinguishable from the precise issue involved here. The fact that an employee is earning a salary, commission or wages,

is the controlling element in the imposition of an income tax as distinguished from the controlling element of an occupational privilege tax. An income tax is not levied upon the privilege of doing business or conducting an occupation within boundaries of a political subdivision, but upon the right of an individual to receive an income for services rendered by him. *Paine v. City of Oshkosh*, 190 Wisc. 69, 208 N.W. 790.

Section 1.2.1 of Ordinance No. 233 makes "the performance of services within Denver by an employee for an employer as herein defined, for any period of time in a calendar month for wages as herein defined," the exercise of a taxable privilege, which is taxed under Section 1.3.1 at the rate of $2.00 "per month for each and every month in which such employee is, for any period of time, so employed."

The obvious intention and purpose of the wording contained in the above ordinance provisions to denominate the right to be employed and thus, earn an income in excess of $250 in the City and County of Denver as a privilege which is, therefore, taxable as such by the City and County of Denver. But such wording is not the determining factor which changes the inherent characteristic of an income tax. It is the operational feature of the tax itself which controls. If its imposition is conditioned upon the receipt of income or wages, and it is structured so that it is to be a direct charge on income of $250 or more per month, it is an income tax, and as such, only the Legislature in Colorado may impose it according to *Sweet, supra*.

For this reason, the validity of Ordinance No. 233 should not be upheld.

MR. JUSTICE KELLEY and MR. JUSTICE LEE join in the views expressed herein.

APPENDIX A-5

MR. JUSTICE KELLEY concurring in part and dissenting in part:

I agree with the majority in striking down Ordinance No. 234 for the reasons stated in the majority opinion. I have joined in Mr. Justice Hodges' dissenting opinion as to the invalidity of Ordinance No. 233. I would hold Ordinance No. 233 invalid for the additional reasons set forth in this dissent.

Mr. Justice Hodges would hold Ordinance No. 233 invalid because, irrespective of its label, it is an income tax and invalid by virtue of *Denver v. Sweet*, 138 Colo. 41, 329 P.2d 441. However, if it is an *occupation tax* its validity must be premised on the proposition that it is *local and municipal* in concept rather than of state-wide concern.

Denver attempts to justify the imposition of its tax on everyone employed in Denver who earns $250 per month, regardless of where he may reside and knowing that many are non-residents, on the basis that it is the "Core City."

There is no formal organization of the *Core City*, it has no fixed boundaries, nor is there any statutory or constitutional recognition of the concept. The very use of the term "core" suggests that it is only *a part of a larger whole*. The *larger whole* is what is known as "the metropolitan area," the problems of which have been the

subject of many legislative and constitutional proposals in the general assembly.

The metropolitan area, at least for census purposes, in addition to Denver, consists of Arapahoe, Adams, Jefferson and Boulder Counties. It is common knowledge that residents of Douglas, Clear Creek, Park, Gilpin and Weld Counties commute to full time jobs in Denver. Certain types of employment permit people to live at even greater distances and still work there to a "sufficient" extent to earn $250.00 per month.

The *metropolitan area* is inhabited by approximately fifty percent of the state's population and Denver, in turn, has almost fifty percent of the area's total.

In view of the magnitude of the area and the population, it is most difficult to escape the conclusion that the imposition of the tax is not of purely *local* concern, but is of *state wide* concern.

When the legislature authorized cities to impose *occupation* taxes it must be assumed that it was thinking of *occupation tax* in the traditional sense—a tax on the owners of businesses for the privilege of conducting various classes of business within the boundaries of the city. We find classic examples of this type of tax in the four cases cited in the majority opinion. *Post v. Grand Junction*, 118 Colo. 434, 195 P.2d 958; *Jackson v. Glenwood Springs*, 122 Colo. 323, 221 P.2d 1083; *Pino v. City of Cortez*, 139 Colo. 575, 342 P.2d 657; *Englewood v. Wright*, 147 Colo. 537, 364 P.2d 569. But it should be noted that in none of those cases were *employees* as such taxed and in none of them were the businesses subject to the tax situated *outside* of the city. To me this suggests that

when a city attempts to encompass the whole or even a substantial part of the state within its taxing program, it is of *state-wide concern*. In this connection it is interesting to note that Denver does not attempt to impose its sales tax on sales of merchandise made *within* Denver for delivery *outside* of Denver.

Home rule cities, other than Denver, within the Denver Metropolitan area are Englewood, Littleton, Aurora, Boulder, Arvada, Golden. In addition, there are some twenty home rule cities which appeared here through the Colorado Municipal League in support of Denver's position. I dare say all of these cities have financial problems almost as acute as those which prompted Denver to enact the ordinances approved by this court. Each of those cities now has the same *power* as Denver to enact the so-called occupational privilege tax.

If, or perhaps more likely—when, each of the home rule cities in the Denver metropolitan area enacts an identical ordinance those same taxpayers who will now be paying $2.00 per month to Denver will then be paying a like sum to six additional communities. Undoubtedly, financial problems are not limited to the cities in the Denver area. It is conceivable that several other cities will follow suit. It is also conceivable that a single taxpayer, such as a salesman, could be subjected to the taxes of several cities.

To those who suggest that the situation depicted does not appear in the record before us, I say that we should not consider the constitutionality of legislation in a vacuum. Also, the assumed facts are set out solely to demonstrate the non-local effect of the application of the law. If the operation of an automobile upon a city's

streets by one under the influence of liquor is of state-wide concern, *Merris v. City of Canon City*, 137 Colo. 169, 323 P.2d 614, the imposition of a tax on a nonresident of the city who enters in the course of his employment is likewise of state-wide concern.

Although the arguments advanced are almost as equally applicable to the tax on the employers, I have elected not to expand this dissent to include Ordinance No. 232 at this time because of other factors which might possibly lead me to a different conclusion. My Concurrence in the majority opinion does not mean that I do not entertain serious doubts as to its validity too.

There is respectable authority for the proposition that a "head" tax, such as we have here, is invalid when the attempt is to impose it on nonresidents. A statement which appeals to my sense of reason is found in *Danyluk v. Bethlehem Steel Company and the City of Johnstown*, 406 Pa. 427, 178 A.2d 609. It reads:

> "The tax bears none of the incidents of an occupation tax which is a flat rate levy measured by the assessed value of a man's occupation. Consequently, in a true occupation tax the amount of the levy varies with the assessed value of a particular mode of employment. Here, no distinctions among occupations are made, a fixed ten dollar levy falling upon all non-residents. The use of the word 'occupational' adds nothing to the levy and does not conceal its real nature as a capitation tax.
>
> "'Capitation or poll taxes are taxes of a fixed amount upon all persons, or upon all the persons of a certain class, within the jurisdiction of the taxing power, without regard to the amount of their prop-

erty or the occupations or business in which they may be engaged.' 51 A.L.R. § 38, p. 66, 1 COOLEY, TAXATION § 40, p. 122 (4th ed. 1924). The tax is imposed because of the protection which a governmental unit affords to persons residing therein, and is designed primarily to require contribution from all residents for the services rendered them by the taxing authority. Consequently, per capita, capitation or head taxes can be imposed only upon residents of the particular political subdivision since residence alone furnishes the contact necessary to render a person amenable to the direct levy."

This case is still the law in Pennsylvania. *Gaugler v. City of Allentown*, 410 Pa. 315, 189 A.2d 264, cited by the majority distinguishes the *Johnstown* ordinance and the *Allentown* ordinance. It is significant, in my judgment, that in the *Gaugler* opinion, immediately following the quotation appearing in the majority opinion, this statement appears:

"* * * In Subsection E of the act, the legislature specifically treated a head or poll tax separately and distinctly from an Occupation Privilege Tax, and clearly expressed an intention that such distinct and separate taxes could be imposed. It is fundamental that every law is to be construed, if possible, to give effect to each and every provision, Act of May 28, 1937, P.L. 1019, § 51, 46 P.S. § 551, and Commonwealth v. McHugh, 406 Pa. 566, 178 A.2d 556 (1962). Moreover, the legislative intent is further clarified by the imposition of *separate* limitations on the amount of the levy that can be imposed in the various enumerated categories."

The majority opinion states that "Colorado has a similar statute delegating like authority to statutory cities. C.R.S. 1963, 139-75-1(3) and 139-78-3(2)." These statutory provisions are identical, one referring to cities of the first class and the other to cities of the second class. The power is granted in this language:

> "(3) Regulation of occupations and businesses.—To license, regulate and tax, subject to any law of the state now in force or hereafter to be enacted, any or all lawful occupations, business places of amusements."

To me the differences between the Colorado statute and the Pennsylvania statute are sufficient to lead me to the conclusion that the reasoning and holding of *Danyluk* applies here rather than that of *Gaugler*.

For the foregoing reasons I would hold Ordinance No. 233 invalid.

APPENDIX B-1

ARTICLE XX

Home Rule Cities and Towns

Section 1. *Incorporated.*—The municipal corporation known as the city of Denver, and all municipal corporations and that part of the quasi-municipal corporation known as the county of Arapahoe, in the state of Colorado, included within the exterior boundaries of the said city of Denver as the same shall be bounded when this amendment takes effect, are hereby consolidated and are hereby declared to be a single body politic and corporate, by the name of the "City and County of Denver." By that name

said corporation shall have perpetual succession, and shall own, possess and hold all property, real and personal, theretofore owned, possessed or held by the said city of Denver and by such included municipal corporations, and also all property, real and personal, theretofore owned, possessed or held by the said county of Arapahoe, and shall assume, manage and dispose of all trusts in any way connected therewith; shall succeed to all the rights and liabilities, and shall acquire all benefits, and shall assume and pay all bonds, obligations and indebtedness of said city of Denver and of said included municipal corporations and of the county of Arapahoe; by that name may sue and defend, plead and be impleaded, in all courts and places, and in all matters and proceedings; may have and use a common seal and alter the same at pleasure; may purchase, receive, hold and enjoy, or sell and dispose of, real and personal property; may receive bequests, gifts, and donations of all kinds of property, in fee simple, or in trust for public, charitable or other purposes; and do all things and acts necessary to carry out the purposes of such gifts, bequests and donations, with power to manage, sell, lease or otherwise dispose of the same in accordance with the terms of the gift, bequest or trust; shall have the power, within or without its territorial limits, to construct, condemn and purchase, purchase, acquire, lease, add to, maintain, conduct and operate, water works, light plants, power plants, transportation systems, heating plants, and any other public utilities or works or ways local in use and extent, in whole or in part, and everything required therefore, for the use of said city and county and the inhabitants thereof, and any such systems, plants or works or ways, or any contracts in relation or connection with either, that may exist and which said city and county may desire to purchase, in whole or in part, the same or any

part thereof may be purchased by said city and county which may enforce such purchase by proceedings at law as in taking land for public use by right of eminent domain, and shall have the power to issue bonds upon the vote of the taxpaying electors, at any special or general election, in any amount necessary to carry out any of said powers or purposes, as may by the charter be provided.

The general annexation and consolidation statutes of the state shall apply to the city and county of Denver to the same extent and in the same manner that they would apply to the city of Denver if it were not merged, as in this amendment provided, into the city and county of Denver. Any contiguous town, city or territory hereafter annexed to or consolidated with the city and county of Denver, under any of the laws of this state, in whatsoever county the same may be at the time, shall be detached per se from such other county and become a municipal and territorial part of the city and county of Denver, together with all property thereunto belonging.

The city and county of Denver shall alone always constitute one judicial district of the state.

Added November 4, 1902.

Section 4. *First charter.*—The charter and ordinances of the city of Denver as the same shall exist when this amendment takes effect, shall, for the time being only, and as far as applicable, be the charter and ordinances of the city and county of Denver; but the people of the city and county of Denver are hereby vested with and they shall always have the exclusive power in the making, altering, revising or amending their charter and, within ten days after the proclamation of the governor announcing

the adoption of this amendment the council of the city and county of Denver shall, by ordinance, call a special election, to be conducted as provided by law, of the qualified electors in said city and county of Denver, for the election of twenty-one taxpayers who shall have been qualified electors within the limits thereof for at least five years, who shall constitute a charter convention to frame a charter for said city and county in harmony with this amendment. Immediately upon completion, the charter so framed, with a prefatory synopsis, shall be signed by the officers and members of the convention and delivered to the clerk of said city and county who shall publish the same in full, with his official certification, in the official newspaper of said city and county, three times, and a week apart, the first publication being with the call for a special election, at which the qualified electors of said city and county shall by vote express their approval or rejection of the said charter. If the said charter shall be approved by a majority of those voting thereon, then two copies thereof (together with the vote for and against) duly certified by the said clerk, shall, within ten days after such vote is taken, be filed with the secretary of state, and shall thereupon become and be the charter of the city and county of Denver. But if the said charter be rejected, then, within thirty days thereafter, twenty-one members of a new charter convention shall be elected at a special election to be called as above in said city and county, and they shall proceed as above to frame a charter, which shall in like manner and to the like end be published and submitted to a vote of said voters for their approval or rejection. If again rejected, the procedure herein designated shall be repeated (each special election for members of a new charter convention being within thirty days after each rejection) until a charter is finally approved by a majority of those voting

thereon, and certified (together with the vote for and against) to the secretary of state as aforesaid, whereupon it shall become the charter of the said city and county of Denver and shall become the organic law thereof, and supersede any existing charters and amendments thereof. The members of each of said charter conventions shall be elected at large; and they shall complete their labors within sixty adys after their respective election.

Every ordinance for a special election of charter convention members shall fix the time and place where the convention shall be held, and shall specify the compensation, if any, to be paid the officers and members thereof, allowing no compensation in case of non-attendance or tardy attendance, and shall fix the time when the vote shall be taken on the proposed charter, to be not less than thirty days nor more than sixty days after its delivery to the clerk. The charter shall make proper provision for continuing, amending or repealing the ordinances of the city and county of Denver.

All expenses of charter conventions shall be paid out of the treasury upon the order of the president and secretary thereof. The expenses of elections for charter conventions and of charter votes shall be paid out of the treasury upon the order of the council.

No franchise relating to any street, alley or public place of the said city and county shall be garnted except upon the vote of the qualified taxpaying electors, and the question of its being granted shall be submitted to such vote upon deposit with the treasurer of the expense (to be determined by said treasurer) of such submission by the applicant for said franchise. The council shall have

power to fix the rate of taxation on property each year for city and county purposes.

Added November 4, 1902.

Section 5. New charters, amendments or measures.— The citizens of the city and county of Denver shall have the exclusive power to amend their charter or to adopt a new charter, or to adopt any measure as herein provided;

It shall be competent for qualified electors in number not less than five per cent, of the next preceding gubernatorial vote in said city and county to petition the council for any measure, or charter amendment, or for a charter convention. The council shall submit the same to a vote of the qualified electors at the next general election not held within thirty days after such petition is filed; whenever such petition is signed by qualified electors in number not less than ten per cent. of the next preceding gubernatorial vote in said city and county, with a request for a special election, the council shall submit it at a special election to be held not less than thirty nor more than sixty days from the date of filing the petition; provided, that any question so submitted at a special election shall not again be submitted at a special election within two years thereafter. In submitting any such charter, charter amendment or measure, any alternative article or proposition may be presented for the choice of the voters, and may be voted on separately without prejudice to others. Whenever the question of a charter convention is carried by a majority of those voting thereon, a charter convention shall be called through a special election ordinance as provided in section four (4) hereof, and the same shall be constituted and held and the proposed charter submitted to a vote of

the qualified electors, approved or rejected, and all expenses paid, as in said section provided.

The clerk of the city and county shall publish, with his official certification, for three times, a week apart, in the official newspapers, the first publication to be with his call for the election, general or special, the full text of any charter, charter amendment, measure, or proposal for a charter convention, or alternative article or proposition, which is to be submitted to the voters. Within ten days following the vote the said clerk shall publish once in said newspaper the full text of any charter, charter amendment, measure, or proposal for a charter convention, or alternative article or proposition, which shall have been approved by majority of those voting thereon, and he shall file with the secretary of state two copies thereof (with the vote for and against) officially certified by him, and the same shall go into effect from the date of such filing. He shall also certify to the secretary of state, with the vote for and against, two copies of every defeated alternative article or proposition, charter, charter amendment, measure or proposal for a charter convention. Each charter shall also provide for a reference upon proper petition therefor, of measures passed by the council to a vote of the qualified electors, and for the initiative by the qualified electors of such ordinances as they may be petition request.

The signatures to petitions in this amendment mentioned need not all be on one paper. Nothing herein or elsewhere shall prevent the council, if it sees fit, from adopting automatic vote registers for use at elections and references.

No charter, charter amendment or measure adopted

or defeated under the provisions of this amendment shall be amended, repealed or revived, except by petition and electoral vote. And no such charter, charter amendment or measure shall diminish the tax rate for state purposes fixed by act of the general assembly, or interfere in any wise with the collection of state taxes.

The city council, or board of trustees, or other body in which the legislative powers of any home rule city or town may then be vested, on its own initiative, may submit any measure, charter amendment, or the question whether or not a charter convention shall be called, at any general or special state or municipal election held not less than 30 days after the effective date of the ordinance or resolution submitting such question to the voters.

As amended November 7, 1950. (See Laws 1951, P. 232.)

Section 6. Home rule for cities and towns.—The people of each city or town of this state, having a population of two thousand inhabitants as determined by the last preceding census taken under the authority of the United States, the state of Colorado or said city or town, are hereby vested with, and they shall always have, power to make, amend, add to or replace the charter of said city or town, which shall be its organic law and extend to all its local and municipal matters.

Such charter and the ordinances made pursuant thereto in such matters shall supersede within the territorial limits and other jurisdiction of said city or town any law of the state in conflict therewith.

Proposals for charter conventions shall be submitted

by the city council or board of trustees, or other body in which the legislative powers of the city or town shall then be vested, at special elections, or at general, state or municipal elections, upon petition filed by qualified electors, all in reasonable conformity with section 5 of this article, and all proceedings thereon or thereafter shall be in reasonable conformity with sections 4 and 5 of this article.

From and after the certifying to and filing with the secretary of state of a charter framed and approved in reasonable conformity with the provisions of this article, such city or town, and the citizens thereof, shall have the powers set out in sections 1, 4 and 5 of this article, and all other powers necessary, requisite or proper for the government and administration of its local and municipal matters, including power to legislate upon, provide, regulate, conduct and control:

a. The creation and terms of municipal officers, agencies and employments; the definition, regulation and alteration of the powers, duties, qualifications and terms or tenure of all municipal officers, agents and employees;

b. The creation of police courts; the definition and regulation of the jurisdiction, powers and duties thereof, and the election or appointment of police magistrates therefor;

c. The creation of municipal courts; the definition and regulation of the jurisdiction, powers and duties thereof, and the election or appointment of the officers thereof;

d. All matters pertaining to municipal elections in

such city or town; and to electoral votes therein on measures submitted under the charter or ordinances thereof, including the calling or notice and the date of such election or vote, the registration of voters, nominations, nomination and election systems, judges and clerks of election, the form of ballots, balloting, challenging, canvassing, certifying the result, securing the purity of elections, guarding against abuses of the elective franchise, and tending to make such elections or electoral votes non-partisan in character;

e. The issuance, refunding and liquidation of all kinds of municipal obligations, including bonds and other obligations of park, water and local improvement districts;

f. The consolidation and management of park or water districts in such cities or towns or within the jurisdiction thereof; but no such consolidation shall be effective until approved by the vote of a majority, in each district to be consolidated, of the qualified electors voting therein upon the question;

g. The assessment of property in such city or town for municipal taxation and the levy and collection of taxes thereon for municipal purposes and special assessments for local improvements; such assessments, levy and collection of taxes and special assessments to be made by municipal officials or by the county or state officials as may be provided by the charter;

h. The imposition, enforcement and collection of fines and penalties for the violation of any of the provisions of the charter, or of any ordinance adopted in pursuance of the charter.

It is the intention of this article to grant and confirm to the people of all municipalities coming within its provisions the full right of self-government in both local and municipal matters and the enumeration herein of certain powers shall not be construed to deny such cities and towns, and to the people thereof, any right or power essential or proper to the full exercise of such right.

The statutes of the state of Colorado, so far as applicable, shall continue to apply to such cities and towns, except in so far as superseded by the charters of such cities and towns or by ordinance passed pursuant to such charters.

All provisions of the charters of the city and county of Denver and the cities of Pueblo, Colorado Springs and Grand Junction, as heretofore certified to and filed with the secretary of state, and of the charter of any other city heretofore approved by a majority of those voting thereon and certified to and filed with the secretary of state, which provisions are not in conflict with this article, and all elections and electoral votes heretofore had under and pursuant thereto, are hereby ratified, affirmed and validated as of their date.

Any act in violation of the provisions of such charter or of any ordinance thereunder shall be criminal and punishable as such when so provided by any statute now or hereafter in force.

The provisions of this section 6 shall apply to the city and county of Denver.

This article shall be in all respects self-executing.

As amended November 5, 1912. (See Laws 1913, p. 669.)

APPENDIX B-2
ENABLING ACT

AN ACT TO ENABLE THE PEOPLE OF COLORADO TO FORM THE ADMISSION OF THE SAID STATE INTO THE UNION ON AN EQUAL FOOTING WITH THE ORIGINAL STATES.

Be it enacted by the senate and house of representatives of the United States of America in congress assembled:

§ 1. *Authority to form state.*—That the inhabitants of the territory of Colorado included in the boundaries hereinafter designated, be, and they are hereby authorized to form for themselves, out of said territory, a state government, with the name of the state of Colorado; which state, when formed, shall be admitted into the Union upon an equal footing with the original states in all respects whatsoever, as hereinafter provided.

§ 4. *Constitutional convention—requirements of constitution.*—That the members of the convention thus elected shall meet at the capital of said territory, on a day to be fixed by said governor, chief justice, and United States attorney, not more than sixty days subsequent to the day of election, which time of meeting shall be contained in the aforesaid proclamation mentioned in the third section of this act, and after organization, shall declare, on behalf of the people of said territory, that they adopt the constitution of the United States; whereupon the said convention shall be and is hereby authorized to form a constitution and state government for said territory; provided, that the constitution shall be republican in form, and make no distinction in civil or political rights on account of race

or color, except Indians not taxed, and not be repugnant to the constitution of the United States and the principles of the declaration of independence; and, provided further, that said convention shall provide by an ordinance irrevocable without the consent of the United States and the people of said state; first, that perfect toleration of religious sentiment shall be secured, and no inhabitant of said state shall ever be molested in person or property, on account of his or her mode of religious worship; secondly, that the people inhabiting said territory do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within said territory, and that the same shall be and remain at the sole and entire disposition of the United States; and that the lands belonging to citizens of the United States residing without said state shall never be taxed higher than the lands belonging to residents thereof, and that no taxes shall be imposed by the state on lands or property therein belonging to, or which may hereafter be purchased by the United States.

APPENDIX C

BY AUTHORITY

Ordinance No. 232

COUNCILMAN'S BILL NO. 237. SERIES OF 1968. INTRODUCED BY COUNCILMEN HOOK, MARRANZINO AND KEATING.

A BILL

FOR AN ORDINANCE CONCERNING REVENUE AND TAXATION, AND IMPOSING A BUSINESS OCCUPATIONAL PRIVILEGE TAX UPON ALL PERSONS ENGAGED IN BUSINESS TO SECURE A PROPER DISTRIBUTION OF THE BURDEN OF TAXES, PROVIDING FOR THE COLLECTION THEREOF: AND PROVIDING PENALTIES FOR THE VIOLATION THEREOF.

BE IT ENACTED BY THE COUNCIL OF THE CITY AND COUNTY OF DENVER.

Section 1. That effective on and after 11:59 p.m. on December 31, 1968, the Revised Municipal Code of the City and County of Denver shall be amended by adding thereto a new article to be designated 166 D, entitled "Business Occupational Privilege Tax", to read as follows:

166 D. Business Ocupational Privilege Tax.

.1 Definitions. As used in this article the following words and phrases shall have the meanings asscribed to them in this section, except where the context clearly indicates or requires a different meaning.

.1-1 "Person" shall mean any natural person, individual, partnership, association, organization, or corporation of any kind of character.

.1-2 "Business" shall mean any business, trade, occupation, profession, avocation or calling of any kind carried on or engaged in by any person, having a fixed or transitory situs within Denver.

.1-3 "Engaged in Business" shall mean to carry on or take part in the operation of the business as owner, operator or agent.

.1-4 "Employee" shall mean any natural person who performs sufficient services to receive as compensation therefor no less than $250.00 per calendar month, for an employer within Denver for any period of time in a calendar month, upon a salary, wage, commission or other compensation basis, whether or not all or any part of the services of such person are performed within Denver.

.1-5 "Denver" and "within Denver" shall mean the City and County of Denver and the area within the territorial limits of the City and County of Denver.

.1-6 "Manager" shall mean the Manager of Revenue of the City and County of Denver.

.1-7 "Taxpayer" shall mean any person engaged in business herein defined who is required to pay the tax herein imposed.

.2 Legislative Intent.

.2-1 The Council of the City and County of Denver finds, determines and declares that considering the busi-

ness and occupations in the City and County of Denver, and the relation of such business and ocupations to the municipal welfare, as well as the relation thereof to the expenditures required by the city and proper, just and equitable distribution of the tax burdens within the City and all matters proper to be considered in relation thereto, and that the tax imposed on each business herein defined is reasonable, proper, uniform and non-discriminatory and necessary for a just and proper distribution of tax burdens within the City and County of Denver.

.3 Tax Levy.

.3-1 On and after 11:59 p.m. on December 31, 1968, and with the month of January, 1969, there is hereby levied by Denver upon, and there shall be collected monthly from and paid to the Manager by every person engaged in any business, trade, occupation profession or calling of any kind having a fixed or transitory situs within Denver, for any period of time in a calendar month within Denver, a BUSINESS OCCUPATIONAL PRIVILEGE TAX in the sum of Two Dollars ($2.00) per month for the first owner, partner, manager or employee, and the additional sum of Two Dollars ($2.00) per month, for each and every additional owner, partner, manager or employee who performs within Denver for any period of time in a calendar month any services or other activities in the operation of such business, trade, occupation, profession or calling within Denver.

.3-2 Each and every person engaged in business within Denver, except as provided in sub-section .3-3, shall on or before the 1st day of January, 1969, and on or before the 1st day of each and every month thereafter, prepare and file a return and pay to the Manager the tax herein

imposed for each taxable calendar month, computed at the rate as set forth in sub-section .3-1 hereof, upon the number of owners, partners, managers and employees who performed in Denver for any period of time, any services or other activities in the operation of said business within Denver during the second calendar month preceding each taxable month.

.3-3 Before any person engages in a new business within Denver in any calendar month and in the second calendar month thereafter, subsequent to 11:59 p.m. on December 31, 1968, such person shall file a return and pay, prior to the date such person first commences business, a tax for the first calendar month and for the second calendar month in which such person is so engaged in business within Denver, upon the estimated number of owners, partners, managers or employees who will perform any services or other activities for any period of time within Denver, in the operation of such business at the rate set forth in subsection .3-1 herein, and shall within thirty days after the close of said first and second calendar months, file amended returns with the Manager, computing and paying this tax for said first and second calendar months on the exact number of owners, partners, managers and employees performing any services or other activities for any period of time, in the said first and second calendar months, as the case may be, within Denver in the operation of said business; and that in the third and in any subsequent taxable month thereafter, such person shall be governed solely by the provisions of sub-section .3-2 hereof.

.3-4 The tax levied under this article is imposed purely for revenue purposes for the support of the government of the City and County of Denver as set forth in Section

.2 hereof; and the levy of the tax under this article is in addition to all other taxes, excises and licenses levied and imposed under any other articles of the Revised Municipal Code or ordinances of the City and County of Denver, and in addition to any taxes, excises or licenses imposed under the laws of the State of Colorado.

.4 Exemptions.

.4-1 Nothing contained in this article shall be construed to empower Denver to levy and collect the tax imposed upon any person engaged in business within Denver under the Constitution of the United States and the Constitution of the State of Colorado.

.5 Effect of Payment or Non-Payment of Tax.

.5-1 Payment of the tax imposed by this article shall not relieve the person paying the same from the payment of any other tax, now or hereafter imposed by ordinance or by any article of the Revised Municipal Code for any business he may carry on, unless so provided by the ordinance or article imposing the tax; it being the intent of this article that the occupational taxes prescribed by the various sections or sub-sections of this article applicable to any person engaged in business shall be cumulative except where otherwise specifically provided.

.5-2 No delinquency in payment of the tax herein provided for and no violation or conviction for such violation of this article, shall be grounds for the suspension or revocation of any other license issued to any person engaged in business within Denver, by the Manager of Safety and Excise, Manager of Health and Welfare, and the Manager of Revenue nor any other official of Denver under any

licensing provisions of the Revised Municipal Code or other ordinances, nor shall the same be grounds for the suspension or revocation of any other license issued by any licensing authority pursuant to the statutes enacted by the General Assembly of Colorado.

.6 Violations.

.6-1 It shall be unlawful for any person to engage in business within Denver for any period of time in a calendar month, commencing with the month of January, 1969, and in each and every month thereafter, without having paid the tax herein imposed in the manner and within the time specified in this article. For the purpose of this article, the opening of a place of business, or offering to sell, followed by a single sale or the doing or performing of any act or thing in the furtherance of a business, trade, occupation, profession or calling of any kind within Denver, shall be construed to be engaging in carrying on such business.

.6-2 Failure of any person to comply with the terms of this article by payment of taxes, filling a return and to otherwise comply with the terms of this article shall constitute a violation of the same.

.6-3 It shall also be a violation of this article for any person to make any false or fraudulent return, or any false statement in any return, or in any manner to evade the collection and payment of the tax, or any part thereof, imposed by this article.

.6-4 Any person who shall violate any of the provisions of this article shall be guilty of a violation hereof.

.6-5 Each and every twenty-four (24) hours continu-

ance of any violation shall constitute a distinct and separate offense.

[Balance of the ordinance is provided and not relevant, but in the filed Record in full.]

APPENDIX D

BY AUTHORITY

Ordinance No. 233

COUNCILMAN'S BILL NO. 238: SERIES OF 1968. INTRODUCED BY COUNCILMEN HOOK, MARRANZINO AND KEATING.

A BILL

FOR AN ORDINANCE CONCERNING REVENUE AND TAXATION AND IMPOSING AN OCCUPATIONAL PRIVILEGE TAX UPON EMPLOYEES TO SECURE A PROPER DISTRIBUTION OF THE BURDEN OF TAXES, PROVIDING FOR THE COLLECTION THEREOF; AND PROVIDING PENALTIES FOR THE VIOLATION THEREOF.

BE IT ENACTED BY THE COUNCIL OF THE CITY AND COUNTY OF DENVER:

Section 1. That effective on and after 11:59 p.m. on December 31, 1968, the Revised Municipal Code of the City and County of Denver shall be amended by adding thereto a new article to be designated 166 C, entitled "Employee Occupational Privilege Tax", to read as follows:

166 C. Employee Occupational Privilege Tax.

.1 Definitions. As used in the article the following words and phrases shall have the meanings ascribed to them in this section, except where the context clearly indeiates or requires a different meaning.

.1-1 "Person" shall mean any natural person, individual, partnership, association, organization or corporation of any kind or character.

.1-2 "Employee" shall mean any natural person who performs sufficient services to receive as compensation therefor no less than $250.00 per calendar month, for an employer within Denver for any period of time in a calendar month, upon a salary, wage, commission or other compensation basis, whether or not all or any part of the services of such person are performed within Denver.

.1-3 "Employer" shall mean any person engaged in any business, trade, occupation, profession or calling of any kind having a fixed or transitory situs within Denver who employs one or more natural persons who perform services for a salary, wage, commission or other compensation basis, whether or not all or only part of the services of such employees are performed within Denver.

.1-4 "Denver" and "within Denver" shall mean the City and County of Denver and the area within the territorial limits of the City and County of Denver.

.1-5 "Wages" shall mean any remuneration for services performed by an employee for any employer, including the cash value of all such remuneration paid in any medium or form other than cash.

.1-6 "Manager" shall mean the Manager of Revenue of the City and County of Denver.

.1-7 "Taxpayer" shall mean any employer who is required to withhold and pay the tax imposed herein; or the employee who is taxed herein, as the case may be.

.2 Legislative Intent.

.2-1 The Council of the City and County of Denver determines and declares that the performance of services within Denver by an employee for an employer as herein defined, for any period of time in a calendar month for wages as herein defined, is the exercise of a taxable privilege, whether or not all or only part of the services of such natural person are performed within Denver.

.2-2 The Council of the City and County of Denver further determines and declares that considering the relationship existing between the exercise by employees of the taxable privilege set forth in sub-section .2-1 hereof and the expenditures required by Denver for street maintenance, police and fire protection and other municipal services and to provide for the general welfare, and the relationship of the exercise of said taxable privilege by employees to a proper, just and equitable distribution of the tax burdens within Denver, and all matters considered in relation thereto, that the tax herein imposed on employees is reasonable, proper, uniform, non-discriminatory and necessary for a just and proper distribution of the tax burdens within Denver.

.3 Tax Levy.

.3-1 On and after 11:59 p.m. on December 31, 1968, and in each and every calendar month thereafter, commencing with the month of January, 1969, there is hereby levied by Denver upon and there shall be collected monthly from

and paid to the Manager by each employee who performs services within Denver for any period of time in a calendar month for an employer, an Employee's Occupational Privilege Tax, at the rate of Two Dollars ($2.00) per month for each and every month in which such employee is, for any period of time, so employed. This tax is in addition to all other taxes of any kind or nature levied by Denver.

.4 Withholding.

.4-1 On and after 11:59 p.m. on December 31, 1968, and in each and every calendar month thereafter, commencing with the month of January, 1969, every employer within Denver, as well as every employer situated outside of Denver who engages in business within Denver, and who employs one or more natural persons exercising within Denver the taxable privilege set forth in section .2 hereof, is hereby charged with the duty of collecting monthly from each of his employees exercising the taxable privilege set forth in section .2 hereof, the sum of Two Dollars ($2.00) per month for each month in which such privilege is exercised, and with the duty of making a return and payment of said tax to the Manager. Further each employer is hereby authorized to deduct this tax from each employee in his employ, whether said employee is paid by salary, wages, commission or other compensation, and whether or not part or all such services are performed within Denver.

.4-2 Each employer shall on or before the 28th day of February, 1969 and on or before the last day of each and every month thereafter prepare and file a return for the preceding calendar month showing computation of the tax herein imposed upon such forms as the Manager may prescribe for each taxable calendar month, and at the

same time shall pay to the Manager the taxes so collected and withheld by him from his employees taxable hereunder. It is further provided that if the employer fails to file said return and to pay such tax, whether or not he makes collection thereof from the salary, wages, commissions or other compensation paid by him to said employee, the employer shall be responsible for the payment of the tax herein imposed as though the tax had originally been levied against him.

4-3 All amounts deducted and withheld by an employer from the wages of an employee shall be considered a tax collected under the provisions of this article and no employee shall have any right of action against his employer in respect to any moneys so deducted and withheld from his wages and paid over to Denver in compliance and in intended compliance with this article

4-4 Every employer who deducts and withholds any amounts under the provisions of this article shall hold the same in trust for Denver for the payment thereof to the Manager in the manner and at the time provided for in this article, and Denver shall have a lien to secure the payment of any amounts withheld and not remitted as herein provided upon all the assets of the employer and all property, including stock in trade, business fixtures and equipment owned or used by the employer in the conduct of his business, so long as any delinquency continues which said lien shall be prior to any lien of any kind whatsoever.

4-5 In the event an employer is exempt from withholding provisions herein, the employee of such exempt employer shall make the file with the Manager a monthly return for the preceding calendar month in such manner and upon such forms as the Manager may prescribe, com-

mencing on the 1st day of February, 1969 and on the first of each month thereafter, and at the same time such employee shall pay to the Manager the tax herein imposed for said preceding calendar month.

.4-6 The Auditor of the City and County of Denver is hereby required to withhold from wages, salaries, commissions or other compensation of all employees of Denver the tax herein imposed, and to report and pay the same to the Manager as set out in this article.

.4-7 Individuals engaged in more than one occupation. Each employee who shall have more than one employer within Denver shall be subject to the payment of this tax by his principal employer and his principal employer shall deduct this tax and when requested so to do shall deliver to said employee evidence on a form to be furnished to the employer by the Manager, which form shall be evidence of deduction having been made, and when presented to any other employer, shall be authority for such employer to NOT DEDUCT this tax from the employee's wages.

.4-8 The failure or ommission by any employer to deduct said tax shall not relieve the employee from the payment of the said tax and from compliance by such employee with such regulations with respect to making returns and payment of the tax as may be fixed in this article or established by the Manager.

.5 Exemptions.

.5-1 Nothing in this article shall be construed to empower Denver to levy and collect the tax hereby imposed upon any taxpayer not within the taxing power of Denver

under the Constitution of the United States and the Constitution and laws of the State of Colorado.

.6 Hearings.

.6-1(1) As soon as practicable after a tax return is filed, the Manager shall examine it and shall determine the correct amount of tax. If the tax found due shall be greater than the amount theretofore assessed, a notice of deficiency shall be mailed to the taxpayer by certified mail.

.6-1(2) The taxpayer may request a hearing on the proposed tax by application to the Manager within thirty days of the mailing of a notice of deficiency. The request for hearing shall set forth the taxpayer's reasons for and the amount of the requested changes in the deficiency.

.6-2(1) An employee who for any reason claims that he is exempt from the tax herein imposed, after payment of the tax to the Manager by such employee or after deduction of said tax from his wages by an employer, as hereinafter provided may apply to the Manager to determine the question of exemption, subject to review by the courts, as herein provided.

.6-2(2) Application for refund must be made within sixty days (60) days from the date of payment of this tax to the Manager by the employee or the date of the deduction of said tax from the wages of said employee by his employer, whichever is applicable, and must be supported by Receipt of Payment or Certificate of Deduction issued by the employer as the case may be, on such forms as shall be prescribed and furnished by the Manager, which forms shall contain such information as said Manager shall prescribe.

.6-2(3) Upon receipt of such application the Manager shall grant to such employee a hearing upon the same and the Manager shall notify such employee in writing of the time and place fixed by him for such hearing. After such hearing, the Manager shall make such order in the manner as is just and lawful and shall furnish a copy of such order to such employee.

.6-2(4) Refunds not Assignable. The right of any person to a refund under this article shall not be assignable.

.6-2(5) Penalty for Violating Refund Provisions. Any applicant for refund under the provisions hereinabove, or any other person, who shall make any false statement in connection with an application for a refund of any tax shall be deemed guilty of a violation of this article and punished as hereinafter provided.

.6-3(6) Violations of Refund Provisions to be Used as Evidence of Fraudulent Intent. If any person be convicted under the provisions of this article, such conviction shall be prima facie evidence that all refunds received by such person during the current year were obtained unlawfully, and the Manager is hereby empowered and directed to bring appropriate action for recovery of such refund. A brief summary of the above mentioned penalties shall be printed on each form application for refund.

.6-3(1) If any person neglects or refuses to make a return in payment of the taxes as required by this article, the Manager shall make an estimate, based upon such information as may be available, of the amount of the taxes due for the period or periods for which the taxpayer is delinquent; and upon the basis of such estimated amount, compute and assess in addition thereto a penalty equal to

ten per cent thereof, together with interest on such delinquent taxes at the rate of one per cent per month, or fraction thereof, from the date when due.

.6-3(2) Promptly thereafter the Manager shall give to the delinquent taxpayer written notice of such estimated taxes, penalty, and interest, which notice must be served personally or by certified mail.

.6-3(3) Such estimate shall thereupon become an assessment, and such assessment shall be final and due and payable from the taxpayer to the Manager ten days from the date of service of the notice or the date of mailing by certified mail; provided, however, that within said ten-day period such delinquent taxpayer may petition the Manager for a revision or modification of such assessment and shall, within such ten-day period, furnish the Manager the facts and correct figures showing the correct amount of such taxes.

.6-3(4) Such petition shall be in writing and the facts and figures submitted shall be submitted either in writing or orally, and shall be given under oath of said taxpayer.

.6-3(5) Thereupon the Manager shall modify such assessment in accordance with the fact submitted, which facts he deems correct. Such assessment shall be considered the final order of the Manager, and may be reviewed under Rule 106(a) (4) of the Colorado Rules of Civil Procedure as provided in this article, provided, that the taxpayer gives written notice to the Manager of such intention within five days after receipt of the final order of assessment.

.6-4(1) The Manager shall notify the taxpayer in

writing of the time and place for such hearing thirty days prior thereto.

.6-4(2) After a hearing under this article, the taxpayer shall not be entitled to a second hearing before the Manager on the matters set forth in his previous request for hearing.

.6-4(3) At the hearing, the taxpayer may assert any facts, make any arguments and file any briefs and affidavits he believes pertinent to his cause.

.6-4(4) In lieu of the request for hearing within the time provided by this section the taxpayer may, at his election, file a written brief and such other written materials or documents as he shall deem appropriate and request that the Manager reconsider the deficiency without a hearing. The Manager shall proceed to reconsider the deficiency in the same manner as if the written material submitted had been presented at a hearing pursuant to this section. The submission of written material shall be considered for all purposes the same as a request for and submission of the material at a hearing.

.6-4(5) Based on the evidence presented at such hearing or filed in support of the taxpayer's contentions, or after the expiration of thirty days from the mailing of the notice of deficiency, if no request for hearing or brief has been filed by the taxpayer, the Manager shall make a final determination within a reasonable time and shall send the taxpayer a notice of final determination by certified mail accompanied by notice and demand for payment. The Manager may modify the tax, penalty and interest questioned at the hearing and may approve a refund. Unless an appeal be taken as provided in this

article, the tax, together with interest thereon and penalties, if any, shall be paid within thirty days after mailing of the notice and demand for payment by the Manager.

.6-4(6) Burden of Proof. The burden of proof shall be on the one making such claim under such reasonable requirements of proof as the Manager may prescribe.

.6-4(7) Hearings, Subpoenas, and Witness Fees. All subpoenas issued under the terms of this article may be served by any person of full age. The fees of witnesses for attendance and trial shall be the same as the fees of witnesses before the District Court, such fees to be paid when the witness is excused from further attendance. When the witness is subpoenaed at the instance of the Manager, such fees shall be paid in the same manner as other expenses under the terms of this article, and when a witness is subpoenaed at the instance of any party to any such proceeding, the Manager may require that the cost of service of the subpoena and the fee of the witness be borne by the party at whose instance the witness is summoned. In such case, the Manager, in his discretion, may require a deposit to cover the cost of such service and witness fees. A subpoena issued as aforesaid shall be served in the same manner as a subpoena issued out of a court of record.

.6-4(8) Judge Compels Attendance. Any judge of the District Court of the Second Judicial District of the State of Colorado, either in term time or vacation, upon the application of the Manager, may compel the attendance of witnesses, the production of books, papers, records, or memoranda, and the giving of testimony before the Manager or any of his duly authorized deputies by an attachment for contempt, or otherwise, in the same manner

as production of evidence may be compelled before said Court.

.6-4(9) Depositions. The Manager or any party in an investigation or hearing, before the Manager may cause the deposition of witnesses residing within or without the State to be taken in the manner prescribed by law for like depositions in civil actions in courts of this State and to that end compel the attendance of witnesses and the production of books, papers, records, or memoranda.

.6-5 Decisions of Manager; Notice; When Final. Every decision of the Manager shall be in writing, and notice thereof shall be mailed to the taxpayer within ten days, and all such decisions shall become final upon the expiration of thirty days after notice of such decision shall have been mailed to the taxpayer, unless proceedings are begun within said time for review thereof as herein provided.

.6-6 Review in District Courts.

.6-6(1) The District Court of the Second Judicial District of the State of Colorado shall have original jurisdiction in proceedings to review all questions of law and fact determined by the Manager in administering the provisions of this article by writ under Rule 106(a)(4) of the Colorado Rules of Civil Procedure.

.6-6(2) Such writs shall be issued by the Clerk of the Court upon a verified petition of the taxpayer, filed within twenty days after notice of the decision of the Manager in any such matter.

.6-6(3) The writ shall be served within five days

after its issuance and shall be returnable at such time as the Court may determine, not less than ten days nor more than twenty days after the date when the writ was issued. The Manager shall forthwith certify the record of his proceedings to said Court.

.6-6(4) The procedure thereunder shall be in conformity with the Rules of Civil Procedure of the State of Colorado.

.6-6(5) Review of District Court Decisions by Supreme Court. The decision of the District Court may be reviewed in the Supreme Court upon writ of error by any party.

.6-7 Jeopardy Assessment and Demands.

.6-7(1) If the Manager finds that collection of the tax will be jeopardized by delay, in his discretion, he may declare the taxable period immediately terminated, determine the tax and issue notice and demand for payment thereof; and, having done so, the tax shall be due and payable forthwith, and the Manager may proceed to collect such tax as hereinafter provided.

.6-7(2) Collection may be stayed if the taxpayer gives such security for payment as shall be satisfactory to the Manager.

.6-8(1) The Manager may issue a warrant directed to any employee, agent, or representative of the department of revenue, sometimes in this section referred to collectively as "agent", commanding him to distrain, seize, and sell the personal property of the taxpayer, except such personal property as is exempted from execution and

sale by any statute of the State of Colorado for the payment of the tax due together with penalties and interest accrued thereon and cost of execution:

.6-8(1)(a) When any deficiency in tax is not paid within thirty days from the mailing of notice and final determination therefor and no appeal from such deficiency has been docketed with the District Court of the Second Judicial District within said period; or

.6-8(1)(b) When any other amount of tax, penalty, or interest is not paid within ten days from the mailing of demand for payment thereof; or

.6-8(1)(c) Immediately upon making of a jeopardy assessments or of the issuance of a demand for payment, as provided in section .6-7.

.6-8(2) Whenever any personal property shall be distrained and seized, the agent shall make a list of such property and deliver a copy thereof to the owner of such property, or to his agent, together with a statement of the amount demanded and notice of the time and place fixed for the sale of such property.

.6-8(3) Such agent shall publish a notice containing a description of the seized property, the reason for its being offered for sale, in a newspaper published in Denver.

.6-8(4) The time fixed for the sale shall be not more than ten days from the date of the first notice, but the same may be adjourned from time to time if there be no bidders, or if the agent shall deem such adjournment advisable for any reason, but in no event shall the sale be

postponed for more than sixty days in all from the date of the first notice.

.6-8(5) In all cases of sale, such agent shall issue a certificate of sale to each purchaser, and such certificate shall be prima facie evidence of the right of the agent to make such sale and conclusive evidence of the regularity of the proceedings in conducting and making such sale. The agent's certificate shall transfer to the purchaser all right, title, and interest of the owner in and to the property sold.

.6-8(6) Any surplus of the sale proceeds remaining over and above the taxes, penalty, interest and costs of making the seizure and advertising the sale shall be paid over to the owner, and a written account of the sale furnished him.

.6-8(7) If, prior to the time fixed for the sale, the amount demanded be paid to such agent, the property distrained upon and seized shall be restored to the owner thereof.

APPENDIX E

BY AUTHORITY

Ordinance No. 234

COUNCILMEN'S BILL NO. 239, SERIES of 1968. AS AMENDED, INTRODUCED BY COUNCILMEN HOOK, MARRANZINO AND KEATING.

A BILL

FOR AN ORDINANCE LEVYING AND IMPOSING AN EARNINGS TAX FOR GENERAL REVENUE PURPOSES OF ONE AND FOUR-TENTHS PER CENT ON SALARIES, WAGES, COMMISSIONS AND OTHER COMPENSATION EARNED AFTER MARCH 31, 1969, BY RESIDENTS OF DENVER; ON SALARIES, WAGES, COMMISSIONS AND OTHER COMPENSATION EARNED AFTER MARCH 31, 1969, BY NON-RESIDENTS OF DENVER, FOR WORK DONE OR SERVICES RENDERED OR PERFORMED IN DENVER; ON THE NET PROFITS EARNED AFTER MARCH 31, 1969, OF ASSOCIATIONS, BUSINESSES; OR OTHER ACTIVITIES CONDUCTED BY A RESIDENT OR RESIDENTS OF DENVER; ON THE NET PROFITS EARNED AFTER MARCH 31, 1969, OF ASSOCIATIONS, BUSINESSES, OR OTHER ACTIVITIES CONDUCTED IN DENVER BY A NON-RESIDENT OR NON-RESIDENTS; AND ON THE NET PROFITS EARNED AFTER MARCH 31, 1969, BY ALL CORPORATIONS AS A RESULT OF WORK DONE OR SERVICES PERFORMED OR RENDERED AND BUSINESS OR OTHER ACTIVITIES CONDUCTED IN DENVER, PRESCRIBING A FORMULA FOR

THE ASCERTAINMENT OF THE NET PROFITS SUBJECT TO TAX OF ANY CORPORATION, ASSOCIATION OR BUSINESS CONDUCTED IN WHOLE OR IN PART BY NON-RESIDENTS OF DENVER, IN ANY CASE IN WHICH THE WORK DONE, SERVICES PERFORMED OR RENDERED, AND BUSINESS OR OTHER ACTIVITIES CONDUCTED ARE DONE, PERFORMED, RENDERED OR CONDUCTED BOTH WITHIN AND WITHOUT DENVER; AUTHORIZING ANY SUCH TAXPAYER TO FILE WITH THE MANAGER AN APPLICATION FOR AN ALTERNATIVE METHOD OF ALLOCATION OR APPORTIONMENT OF THE NET PROFITS REASONABLY ATTRIBUTABLE TO WORK DONE, SERVICES PERFORMED OR RENDERED, AND BUSINESS OR OTHER ACTIVITIES CONDUCTED IN DENVER; PRESCRIBING A FORMULA FOR THE ASCERTAINMENT OF EARNINGS SUBJECT TO TAX OF ANY NON-RESIDENT INDIVIDUAL IN ANY CASE IN WHICH THE WORK DONE, SERVICES PERFORMED OR RENDERED, AND BUSINESS OR OTHER ACTIVITIES CONDUCTED ARE DONE, PERFORMED, RENDERED OR CONDUCTED BOTH WITHIN AND WITHOUT DENVER, AND EMPOWERING THE MANAGER TO DETERMINE BY RULE OR REGULATION A DIFFERENT APPORTIONMENT OF SUCH EARNINGS AS ARE REASONABLY ATTRIBUTABLE TO WORK DONE OR SERVICES RENDERED OR PERFORMED IN DENVER, IN CASES WHERE THE SERVICES RENDERED ARE OF A PECULIAR NATURE, OR WHERE THE BASIS OF COMPENSATION IS UNUSUAL, OR FOR

ANY OTHER REASON; PROVIDING FOR THE FILING OF RETURNS AND PAYMENT OF THE TAX BY INDIVIDUALS, ASSOCIATIONS, BUSINESSES, CORPORATIONS, FIDUCIARIES, AND OTHER ENTITIES, AND FOR THE FURNISHING OF INFORMATION BY SUCH TAXPAYERS AND BY EMPLOYERS; IMPOSING ON EMPLOYERS THE DUTY OF COLLECTING THE TAX AT THE SOURCE; PRESCRIBING THE DUTIES AND POWERS OF THE MANAGER; AND PROVIDING PENALTIES FOR THE VIOLATION THEREOF.

BE IT ENACTED BY THE COUNCIL OF THE CITY AND COUNTY OF DENVER.

Section 1. That effective on and after 11:59 p.m. on March 31, 1969, the Revised Municipal Code of the City and County of Denver shall be amended by adding thereto a new article to be designated 166 E, entitled "Earnings Tax", to read as follows:

166 E. Earnings Tax.

.1 Definitions. As used in this article, the following words shall have the meaning ascribed to them in this section, except where the context clearly indicates or requires a different meaning.

.1-1 "Association" shall mean a partnership, limited partnership, or any other form of unincorporated business or enterprise, owned by two or more persons.

.1-2 "Business" shall mean an enterprise, activity, profession, trade or undertaking of any nature conducted for profit or ordinarily conducted for profit, whether by

an individual, association, or any other entity other than a corporation.

.1-3 "City" shall mean the City and County of Denver.

.1-4 "Manager" shall mean the Manager of Revenue of the City and County of Denver.

.1-5 "Corporation" shall mean a corporation or joint stock association organized under the laws of the United States, the State of Colorado, or any other state, territory, or foreign country or dependency.

.1-6 "Employer" shall mean an individual, association, corporation, (including a corporation not for profit) governmental administration, agency, arm, authority, board, body, branch, bureau, department, division, subdivision, section or unit or any other entity, who or that employs one or more persons on a salary, wage, commission, or other compensation basis, whether or not such employer is engaged in business as hereinbefore defined.

.1-7 "Net Profits" shall mean the net income of any association, business or corporation remaining after deducting the necessary expenses of operation from the gross profits or earnings.

.1-8 "Non-Resident" shall mean an individual, association, business, corporation, fiduciary or other entity domiciled outside Denver.

.1-9 "Person" shall mean every natural person, association, business or fiduciary. Whenever the term "person" is used in any clause prescribing and imposing a penalty, the term, as applied to associations, shall mean the

partners thereof, and, as applied to corporations, the officers thereof.

.1-10 "Resident" shall mean an individual, association, business, corporation, fiduciary or other entity domiciled within the City.

.1-11 "Taxpayer" shall mean a person, whether an individual, association, business, corporation, fiduciary or other entity required hereunder to file a return of earnings or net profits, or to pay a tax thereon.

.2 Legislative Intent. The Council of the City and County of Denver, in recognition of the impending financial crisis confronting Denver and the over-burdening of the resident taxpayers of Denver with the full cost of furnishing all municipal services of Denver as the core of the Denver Metropolitan area under the ordinary taxable sources available to Denver without adequate contributions from those wage earners and business men who use all of such services in the performance of activities within Denver in their respective trades, business and professions which enable them to secure their livelihood, finds, determines and declares that in order to provide for such additional costs of said essential municipal services, and to more equitably distribute the cost thereof among the users of the same, that it is necessary and proper to enact an earnings tax by the City and County of Denver, levied upon the users of said services, upon residents and non-residents alike, to secure the solvency of Denver as the core city of the Denver Metropolitan area.

.2-1 The Council of the City and County of Denver determines that the earnings tax hereinafter imposed shall

during the calendar year 1969, be levied upon those earnings listed in Section .3 hereof, in excess of $2,250.00 earned in that calendar year; and that in each and every calendar year thereafter, the earnings tax hereinafter imposed shall be levied upon those earnings listed in Section .3 hereof, in excess of $3,000.00 earned in any calendar year.

.3 A tax for general revenue purposes of one and four-tenths per cent, (1.4%) is hereby imposed on (a) salaries, wages, commissions and other compensation earned after March 31, 1969, by resident individuals of Denver, including the entire distributive share of any member of a partnership or association, less the amount thereof, if any, which may be shown to have been taxed under the provisions hereof to said association or partnership; and on (b) salaries, wages, commissions and other compensation earned after March 31, 1969, by non-resident individuals of Denver for work done or services performed or rendered in Denver; and on (c) the net profits earned after March 31, 1969, of associations, businesses, or other activities conducted by a resident or residents, and on (d) the net profits earned after March 31, 1969, of associations, businesses, or other activities conducted in Denver by a non-resident or non-residents; and (e) on the net profits earned after March 31, 1969, by all corporations as a result of work done or services performed or rendered, and business or other activities conducted in Denver.

.3-1 Said tax shall first be levied, collected and paid with respect to that portion of salaries, wages, commissions, other compensation and net profits earned after March 31, 1969, and prior to January 1, 1970, and thereafter said tax shall be levied, collected and paid on the basis of the calendar year; provided, however, that where

the fiscal year of any person, association, business or corporation differs from the calendar year, the tax shall first be applied to that portion of the net profits for the fiscal year as shall be earned after March 31, 1969, and thereafter on the fiscal year basis.

.4 The net profits subject to tax of any corporation, or of any association or business conducted in whole or in part by non-residents of Denver, in any case in which the work done, services performed or rendered, and business or other activities conducted are done, performed, rendered, or conducted both within and without Denver, shall be ascertained as follows: to wit:

.4-1 If such taxpayer shall keep its books and records in such a manner as to show the portion of its net profits which is reasonably attributable to work done, services performed or rendered, and business or other activities conducted in Denver, then such portion of said net profits shall be subject to said tax.

.4-2 If the books and records of such taxpayer are not kept in such a manner so as to show the portion of its net profits which is reasonably attributable to work done, services performed or rendered, and business or other activity conducted in Denver, then the portion of the entire net profits of such taxpayer subject to tax shall be ascertained by multiplying the entire net profits by an allocation percentage which shall be determined as follows, to wit:

.4-2(1) The percentage which the average value of such taxpayer's real and tangible personal property within Denver during the period covered by its return bears to the average value of all its real and tangible personal prop-

erty wherever situated during such period shall first be ascertained.

.4-2(2) The percentage which the gross receipts of such taxpayer derived from business within Denver during the period covered by its return bear to the total of such gross receipts wherever derived, shall then be ascertained. Gross receipts derived from business within Denver shall be the amount of gross receipts from (a) sales (including also sales of services), except those negotiated or effected in behalf of such taxpayer by agents or agencies, chiefly situated at, connected with, or sent out from premises for the transaction or business owned or rented by such taxpayer outside Denver, and (b) rentals or royalties from property situated, or from the use of patents, within Denver.

.4-2(3) The percentage which the total wages, salaries and other personal service compensation during the period covered by its return, of its employees within Denver, except general executive officers, bears to the total wages, salaries and other personal service compensation during such period of all of such taxpayer's employees within and without Denver, except general executive officers, shall then be ascertained. The percentages determined in accordance with sub-paragraph (1) (2) and (3) above or such of the aforesaid paragraphs as shall be applicable to the particular taxpayer's business, shall be added together and the total so obtained shall be divided by the number of percentages used in arriving at said total. The result so obtained shall be the allocation percentage.

.4-3 If any such taxpayer believes that the methods or apportionment hereinbefore prescribed have operated or

will so operate as to subject it to taxation on a greater portion of its net profits than is reasonably attributable to work done, services performed or rendered, and business or other activities conducted in Denver, shall be entitled to file with the Manager a statement of its objections and of such alternative method of allocation or apportionment as it believes to be proper under the circumstances and in such manner and with such detail and proof and within such time as the Manager may reasonably prescribe; and thereupon if the Manager shall conclude that the methods of allocation or apportionment hereinabove provided are in fact inapplicable or inequitable, he shall redetermine the net profits subject to tax by such other method of allocation or apportionment as seems best calculated to assign to Denver for taxation the portion of the net profits reasonably attributable to work done, services performed or rendered, and business or other activities conducted in Denver, not exceeding, however, the amount which would be arrived at by the application of the methods or apportionment hereinabove provided.

.5 The earnings subject to tax of any non-resident individual, in any case in which the work done, services performed or rendered and businesses or other activities conducted are done, performed, rendered or conducted both within and without Denver, shall be ascertained as follows, to wit:

.5-1 If the amount of such earnings depends on the volume of business transacted by such individual, then the portion of such earnings subject to tax shall be the portion of such earnings transacted by such individual in Denver bears to the volume of business transacted by him within and without Denver.

.5-2 In all other cases, the portion of such earnings subject to tax shall be the portion of such earnings which the total number of working days employed within Denver bears to the total number of working days within and without Denver.

.5-3 If it is impracticable to apportion such earnings as aforesaid either because of the peculiar nature of the services of such individual, or on account of the unusual basis of compensation, or for any other reason, then the amount of such earnings reasonable attributable to work done, or services performed or rendered, in Denver, shall be determined in accordance with rules or regulations adopted or promulgated by the Manager for the purpose.

.6 Except as hereinafter provided each individual, association, business, corporation, fiduciary, or other entity, whose earnings or profits are subject to the tax imposed by this ordinance shall, on or before March 31 of each year, unless an extension is granted by the Manager, make and file with the Manager a return, on a form obtainable from the Manager, setting forth the aggregate amount of salaries, wages, commissions, compensation or net profits earned by such taxpayer during the preceding calendar year and subject to the said tax, together with such other pertinent information as the Manager may require:

.6-1 Provided, however, that where the return is made for a fiscal year different from a calendar year, the said return is made for a fiscal year different from a calendar year, the said return shall be made within ninety days from the end of the fiscal year, unless an extension is granted by the Manager. Such return shall also show the amount of the tax imposed by the ordinance on such earnings and profits. The taxpayer making the said return

shall, at the time of filing thereof, pay to the said Manager the amount of tax shown as due thereon:

.6-2 Provided, however, that where any portion of the tax so due shall have been deducted at the source and shall have been paid to the Manager by the employer making the said deduction, credit for the amount so paid shall be deducted from the amount shown to be due, and only the balance, if any, shall be due and payable at the time of the filing of the said return;

.6-3 Provided, further, that no return shall be required of any taxpayer who has received only wages, salaries, commissions or other compensation and from which the tax has been withheld at the source, as hereinafter provided. The failure of any employer or any taxpayer to receive or procure a return form shall not excuse such employer or taxpayer from making a return or paying the tax due.

.7 Every employer within Denver who employs one or more persons on a salary, wage, commission, or other compensation basis, shall deduct at the time of the payment thereof, the tax of one and four tenths per cent (1.4%), of salaries, wages, commissions or other compensation due by the said employer to the said employee and subject to tax, and shall make his return monthly and pay to the said Manager, not later than the last day of each month, the amount of taxes so deducted for the calendar month next preceeding the month in which the return is required to be filed. Said return shall be on a form, or forms obtainable from the Manager and shall be subject to the rules and regulations prescribed by the said Manager. Every such employer shall furnish each employee with a statement of the amount of the tax withheld. The failure of any employer to deduct or withhold at the source the amount

of the tax due from the employee shall not relieve the employee from the duty of making a return and paying the tax.

.8 Nothing contained in this article shall be construed to empower Denver to levy and collect the tax imposed upon any person not within the taxing power of Denver under the Constitution of the United States and the Constitution of the State of Colorado.

9. It shall be the duty of the Manager to collect and receive the tax imposed by this article. In addition to keeping the records now required by law and paying over the proceeds from the collection of taxes to the treasurer of Denver, as now provided by law, the Manager shall keep an accurate and separate account of all such tax payments received by him, showing the name and address of the taxpayer and the date of the payments. The Manager is hereby charged with the enforcement of the provisions of this article and is hereby empowered to adopt and promulgate and to enforce rules and regulations relating to any matter or thing pertaining to the administration and enforcement of the provisions of this article, including provisions for the re-examination and correction or returns and payments alleged or found to be incorrect or as to which an overpayment or underpayment is claimed or found to have occurred.

.9-1 The Manager or any agent or employee authorized in writing by him is hereby authorized to examine the books, papers and records of any employer or supposed employer, or of any taxpayer or supposed taxpayer, in order to verify the accuracy of any return made, or if no return was made, to ascertain the tax imposed by this article. Every such employer or supposed employer, or taxpayer or supposed taxpayer, is hereby directed and re-

quired to give to the Manager or the duly authorized agent or employee the means, facilities and opportunity for such examinations and investigations as are hereby required.

.9-2 The Manager is hereby authorized to examine any person, concerning any income which was or should have been returned for taxation and to this end may order the production of books, papers and records and the attendance of all persons before him, whether as parties or witnesses, whom he believes to have knowledge of such income. The refusal of such examination by any employer or taxpayer shall be deemed a violation of this article. Any information obtained as a result of any return, investigation, hearing, or verification required or authorized by this article, shall be confidential except for official purposes and except in accordance with judicial order. Any person otherwise divulging such information shall upon conviction thereof, be deemed guilty of a violation of this article.

.10 All taxes imposed by this article and remaining unpaid after they have become due shall bear interest at the rate of six per cent (6%) per annum, and the delinquent taxpayer shall be liable for said tax and interest, and, in addition thereto, to a penalty of one per cent (1%) of the amount of the unpaid tax for each month or fraction of a month for the first six (6) months of delinquency.

.11 All taxes imposed by this article, together with all interest and penalties, shall be recoverable by Denver as other debts of like amounts are recoverable.

.12 Any person or taxpayer who shall fail, neglect or refuse to make any return required of this article or any employer who shall fail, neglect or refuse to withhold or pay over to Denver any amount of tax subject to withholding hereunder or any person or taxpayer who shall

refuse to permit the Manager, or his duly authorized deputy or agent, to examine his books, records or papers, or who shall knowingly make an incomplete, false or fraudulent return, or who shall attempt to do anything whatsoever to avoid the full disclosure of the amount of earnings or profits shall be deemed guilty of a violation of this article.

.13 If any sentence, clause or section or any part of this article is for any reason held to be unconstitutional, illegal or invalid, such unconstitutionality, illegality or invalidity shall not affect or impair any of the remaining provisions, sentences, clauses, sections or parts of this article. It is hereby declared to be the intent of the Council of the City and County of Denver that this article would have been adopted had such unconstitutional, illegal or invalid sentence, clause, section of part thereof not been included therein.

Section 2. The Council finds this Ordinance is necessary for the immediate preservation of the public health and public safety and determines that it shall take effect immediately upon its final passage and publication. The amendment to the Revised Municipal Code and the tax imposed as set forth by Section 3 hereof shall not, however, be effective until 11:59 p.m. on March 31, 1969.

PASSED by the Council July 15, 1968, ELVIN R. CALDWELL, President. Approved: TOM CURRIGAN, Mayor, July 17, 1968. Attest: F. J. SERAFINI, Clerk and Recorder, Ex-Officio Clerk of the City and County of Denver.

(Seal)

Published in The Daily Journal, June 28, July 12 as amended, and July 19, 1968 39-00

APPENDIX F

Come now the parties above named, the Plaintiffs by their attorneys, Nathan H. Creamer and George Louis Creamer, and the Defendants by their attorney, Mr. Max Zall, as City Attorney of the City and County of Denver, and stipulate and agree as follows:

1. That the several Plaintiffs in this action are identified, have addressed, carry on business, and are employed as in the sub-paragraphs below set forth:

1.1 Duffy Storage and Moving Co. has its offices at 389 South Lipan Street, Denver, Colorado; is engaged in the transport, storage, and moving of goods, wares, and merchandise; conducts its business within the City and County of Denver, State of Colorado, and throughout Colorado; is duly certificated, licensed, and authorized so to do; and is engaged in the employment of and employs fifty (50) employees engaged in interstate and intrastate commerce, and within the State of Colorado, some or all of whom engage in business activity in the City and County of Denver and State of Colorado, and some of whom are residents of the City and County of Denver, and some non-residents thereof.

1.2. James A. Duffy is executive head and a principal managerial officer of Duffy Storage and Moving Co., and is resident at 1131 Racine Street, in the City of Aurora, County of Arapahoe, State of Colorado.

1.3. George V. Simone is employed by the said Duffy Storage and Moving Co., as its sales manager, and in his employment performs functions and duties both within the City and County of Denver, State of Colorado, and else-

where and throughout the State of Colorado, and is resident at 270 South Depew Street, Lakewood, Jefferson County, State of Colorado.

1.4. Denver Auto Trimming Supply Co. is engaged in business at 1120 Galapago Street, Denver, Colorado, and employs persons all of whom are resident in the City and County of Denver, State of Colorado, its business involving the City and County of Denver and other surrounding areas.

1.5. Houston Gibson is the principal and managerial officer of Denver Auto Trimming Supply Co., is engaged in the conduct of its business affairs, and is a citizen, resident, and taxpayer in the City and County of Denver and State of Colorado.

1.6. Winslow Crane Service Co. maintains and conducts its principal office at 3002 South Huron Street, in Englewood, Arapahoe County, Colorado, and is active in contracting and renting of machinery in the Denver Metropolitan Area, including the City and County of Denver, having its principal offices in the City of Englewood, County of Arapahoe, and employing approximately one hundred employees in its business operations, some or all of whom at some time conduct some activities in or connected with the City and County of Denver, State of Colorado, or are resident in the City and County of Denver, State of Colorado, and some of whom are non-residents of the City and County of Denver, and conduct some business activities within the City and County of Denver.

1.7. Thomas & Son Transfer Line, Inc., has and maintains its office and warehouse at 1631 15th Street, Denver, Colorado; is engaged in the transfer and storage of mer-

chandise in the City and County of Denver, State of Colorado, and Denver Metropolitan Area, and generally throughout the State of Colorado, and is duly licensed, certificated, and authorized so to conduct business; and employs approximately twenty-five (25) persons in the conduct of its business, some of whom are engaged in activities in the City and County of Denver, and some of whom are resident in the City and County of Denver, and some of whom are resident elsewhere.

1.8. Ridge Erection Co. has and maintains its offices at 6015 West 56th Avenue; Arvada, Jefferson County, Colorado, and is engaged in the business of steel erection and in crane rental service, being domiciled in the County of Jefferson, State of Colorado, and conducting its business throughout the State of Colorado, including the City and County of Denver and the areas surrounding Denver, and has employees some of whom are resident and some non-resident in the City and County of Denver, and some of whom perform services in or connected with the City and County of Denver, State of Colorado.

2. The Plaintiffs bring this action and act in bringing it as representatives of and for and on behalf of others similarly situate. The class or classes of persons so similarly situate are so numerous as to be impossible to bring them individually before the Court.

2.1. Plaintiffs, in their said representative capacity, do not act with helation to any special circumstance or matters with relation to the subject ordinances, or any of them, as they may affect particular individuals, but only with relation to the questions of power, jurisdiction, and authority to pass and enforce the several ordinances and the taxes and impositions asserted to be made by them.

2.2. It is agreed that the Plaintiffs are proper parties Plaintiff to bring and maintain the present action, and there is no question here as to the status or right of the Plaintiffs or any of them as parties Plaintiff, nor of their right to seek the relief herein prayed.

2.3 It is agreed that there is and exists a justifiable controversy or controversies between the Plaintiffs and the Defendants, and that there is desireability of declaratory relief as in the Complaint sought; without prejudice by this stipulation as to the right of the parties each to assert what that declaratory judgment should in substance contain.

3. The Defendant City and County of Denver is a municipal corporation, organized and existing under and by virtue of the Constitution and laws of the State of Colorado.

4. The Defendant Board of Councilmen of the City and County of Denver is sometimes also known as and referred to as the City Council of the City and County of Denver, and is the legislative body of the City and County of Denver; and the individuals Robert B. Keating, John F. Kelly, Irving S. Hook, Paul A. Hentsell, Kenneth A. MacIntosh, Carl N. DeTemple, Edward F. Burke, Jr., Elvin R. Caldwell, and Ernest P. Marranzino are the members of and are and constitute the said The Board of Councilmen of the City and County of Denver, sometimes also known and referred to as The City Council of the City and County of Denver.

5. The Defendant Charles L. Temple, is the Manager of Revenue of the City and County of Denver.

6. That the texts of the subject Ordinances, being the said Ordinances No. 232, Series of 1968, derivative from Councilman's Bill No. 237, 1968; No. 233, Series of 1968, derivative from Councilman's Bill No. 238, 1968; and 234, Series of 1968, derivative from Councilman's Bill No. 239, 1968, are as set forth in Complaint Exhibits A, B, and C, respectively, and in copies of those three exhibits attached hereto as Exhibits A, B, and C, and the said Exhibits, attached hereto and to the Complaint, may be received in evidence as the texts of the said subject ordinances without further proof of such texts or submission of further copies thereof.

6.1. That since the dates of the said above referred ordinances, there have been enacted Ordinance 375, Series of 1968, derivative from Councilman's Bill No. 407, Series of 1968; and Ordinance 376, Series of 1968, derivative from Councilman's Bill No. 408, Series of 1968, each passed in Council November 25, 1968, signed by the Mayor November 26, 1968, and published in The Daily Journal, November 29, 1968, being ordinances amendatory of Ordinances 232 and 233, Exhibits A and B, respectively.

6.2. The texts of the said ordinances in 6.1 referred are attached hereto as Exhibits 1 and 2, respectively, and the said Exhibits as attached may be received in evidence herein as texts of the subject ordinances without further proof of such texts or submission of further copies thereof.

6.3. That the said amendments are characterizable as "housekeeping" amendments, and are not contended by either party hereto substantively to affect any of the issues in the present action.

7. That the matters here involved are of urgent and immediate public concern.

8. That the questions presented in this action are entirely questions of law, involving the validity, as matter of law, of the several ordinances the subject matter of this action, being the said Ordinances 232, 233, and 234, Series of 1968, as amended by the said Ordinances 375 and 376, Series of 1968, for each of the reasons under the Constitution of the United States, the Constitution of Colorado, the Enabling Act of the State of Colorado, and the Charter of the City and County of Denver set forth in the pleadings herein.

9. There are no disputed questions of fact involved in this action. It is the purpose and intention of this Stipulation to agree to all questions of fact. As to all such questions this Stipulation shall govern, and shall be admitted as and constitute evidence of each of the matters of fact here stipulated and agreed, and shall be a complete resolution of such question of fact, if any there be, under the pleadings, and shall supersede all allegations in the pleadings as to all factual matters, it being the purpose and intention of all of the parties that the within matter be resolved as a matter of substantive law.

10. There are no questions here presented as to the procedural adoption of the several ordinances the subject matter hereof, but the questions presented relate to the substantive validity of those ordinances and the jurisdiction to adopt or to enforce them, all as in the pleadings set forth.

11. There is referred to herein an action entitled CITY AND COUNTY OF DENVER et al. vs. ARTHUR N. SWEET, being No. 18902 in the Supreme Court of the State of Colorado, reported as 138 Colo. 41, 329 P.2d 441

(1958), and being writ of error from an action in the District Court in the City and County of Denver, entitled ARTHUR N. SWEET and ETHEL K. GALT,

Plaintiffs,

vs.

THE CITY AND COUNTY OF DENVER, A MUNICIPAL CORPORATION, EXISTING UNDER AND BY VIRTUE OF THE CONSTITUTION OF HE STATE OF CODORADO; ROLLAND L. MAPELLY, GEORGE CAVENDER, WILLIAM E. FLOR, PAUL A. NETZEL, PHILIP MILSTEIN, C. PAUL HARRINGTON, EARL DOLE, ELVIN R. CALDWELL, AND JOE CIANCIO, JR., AS MEMBERS OF THE COUNCIL OF THE SAID CITY AND COUNTY OF DENVER, AND BEING AND CONSTITUTING THE COUNCIL OF THE CITY AND COUNTY OF DENVER; CHARLES BYRNE, AS CLERK AND RECORDER OF THE CITY AND COUNTY OF DENVER AND EX OFFICIO MEMBER OF THE ELECTION COMMISSION OF THE CITY AND COUNTY OF DENVER; AND FRANCIS MANCINI, JOHN MACDONALD, AND CHARLES BYRNE, AS MEMBERS OF THE ELECTION COMMISSION OF THE CITY AND COUNTY OF DENVER, AND BEING AND CONSTITUTING THE ELECTION COMMISSION OF THE CITY AND COUNTY OF DENVER,

Defendants.

and being No. B-26230, Division I, in the District Court in and for the City and County of Denver, State of Colorado. Allegations concerning that action, are made in the pleadings. It is agreed that this Court may take judicial notice of its own records and of the proceedings of the

Supreme Court of the State of Colorado with relation to the said action in this Court and in the Supreme Court of Colorado. This agreement is not purposed to prejudice the contentions of the parties as in the pleadings made as to the effect of that action, but to permit the proceedings therein to be before this Court without further evidentiary formality.

12. There are in the State of Colorado more than two dozen home-rule cities, having charters adopted in pursuance of the powers granted by Article XX of the Constitution of Colorado.

12.1. There have been adopted by the City and County of Denver various licensing ordinances relating to businesses and occupations. Such provisions as exist are incorporated in the municipal Code of the City and County of Denver and in the Building Code of the City and County of Denver. As relates to the provisions of any such licensing ordinances, copies of the said Municipal Code of the City and County of Denver, as amended, and of the Building Code of the City and County of Denver, as amended, may be judicially noted and be entered upon the record without further identification.

Dated at Denver, Colorado, this 11th day of December, 1968.

NATHAN H. CREAMER

GEORGE LOUIS CREAMER

928 Equitable Building
Denver, Colorado 80202

Attorneys for the Appellants.

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Supreme Court, U.S.
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JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1969

No. [redacted] 132

DUFFY STORAGE AND MOVING CO.; JAMES A. DUFFY; GEORGE V. SIMONE; DENVER AUTO TRIMMING SUPPLY CO.; HOUSTON GIBSON; WINSLOW CRANE SERVICE CO.; THOMAS & SON TRANSFER LINE, INC.; AND RIDGE ERECTION CO.,
Appellants,

vs.

THE CITY AND COUNTY OF DENVER, a municipal corporation; THE BOARD OF COUNCILMEN OF THE CITY AND COUNTY OF DENVER, sometimes also known and referred to as The City Council of The City and County of Denver, and Robert B. Keating, John F. Kelly, Irving S. Hook, Paul A. Hentzell, Kenneth A. MacIntosh, Carl W. DeTemple, Edward F. Burke, Jr., Elvin R. Caldwell, Ernest P. Marranzino, as the members of and being and constituting the Board of Councilmen of the City and County of Denver, sometimes also known and referred to as the City Council of the City and County of Denver, and CHARLES L. TEMPLE, as Manager of Revenue of the City and County of Denver,
Appellees.

MOTION TO DISMISS AND APPENDICES

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 1411

DUFFY STORAGE AND MOVING CO.; JAMES A. DUFFY; GEORGE V. SIMONE; DENVER AUTO TRIMMING SUPPLY CO.; HOUSTON GIBSON; WINSLOW CRANE SERVICE CO.; THOMAS & SON TRANSFER LINE, INC.; AND RIDGE ERECTION CO.,

Appellants,

vs.

THE CITY AND COUNTY OF DENVER, a municipal corporation; THE BOARD OF COUNCILMEN OF THE CITY AND COUNTY OF DENVER, sometimes also known and referred to as The City Council of The City and County of Denver, and Robert B. Keating, John F. Kelly, Irving S. Hook, Paul A. Hentzell, Kenneth A. MacIntosh, Carl W. DeTemple, Edward F. Burke, Jr., Elvin R. Caldwell, Ernest P. Marranzino, as the members of and being and constituting the Board of Councilmen of the City and County of Denver, sometimes also known and referred to as the City Council of the City and County of Denver, and CHARLES L. TEMPLE, as Manager of Revenue of the City and County of Denver,

Appellees.

MOTION TO DISMISS AND APPENDICES

Come now the Appellees above-named, by their Counsel, and under and pursuant to Rule 16 of the Rules of the Supreme Court move this Honorable Court to dismiss this purported appeal of the Appellants from the final judgment (Appellees' Appendix 1, p. 10 of the Supreme Court of the State of Colorado, dated February 17, 1969, upon the grounds that (a) such appeal does not present a substantial federal question; (b) that the federal questions sought to be reviewed were not properly raised, or expressly passed on; and, (c) that the judgment of the

Colorado Supreme Court rests on an adequate non-federal basis, all as more particularly hereinafter set forth.

Appellees' Factual Statement

We find that while the Appellants' "FACT STATEMENT AND STATUTES INVOLVED," as set forth on pages 3 through 11 of Appellants' Jurisdictional Statement herein, does contain many uncontrovertible statements, yet the editorializing by the writer has, in our opinion, presented the matter improperly. For such reasons, we shall inform the Court in our own language the facts before the Colorado Court in this action as they pertain to the issues before the Court. We have added as Appendices herto, viz., the final judgment of the Colorado Supreme Court herein dated February 17, 1969 as Appendix 1, p. 10 and the final judgment herein dated December 20, 1968 of the District Court of the City and County of Denver as Appendix 2.

The Appellants challenged the legality of three taxing ordinances of the City and County of Denver in the District Court of the City and County of Denver. The alleged existence of a question of constitutional infirmity on the federal level of said taxes was eliminated from the cause by the execution of the Stipulation (Appellants' Jurisdictional Appendix F). That document by paragraph 2.1 thereof (p. 112, Appellants' Jurisdictional Statement), limited for all purposes said cause to "questions of power, jurisdiction and authority to pass and enforce the several ordinances and the taxes and impositions asserted to be made by them." Likewise said document became by the terms of paragraph 9 thereof (p. 115, Appellants' Jurisdictional Statement) an agreed statement of fact, as set forth by paragraph 1, in subparagraphs 1 through 8

thereof (pp. 110-112, Appellants' Jurisdictional Statement).

We wish to point out that the only factual matters before the State Courts, the adoption of the subject ordinances being admitted, related to the fact (a) that the named corporate plaintiffs were engaged in business within the City and County of Denver to some considerable extent, and in so doing employed both residents and non-residents of the City and County of Denver to perform services for the corporation therein, and (b) that the individual plaintiffs performed services within Denver for said corporate plaintiffs in a managerial capacity and that of master and servant. It is also admitted that one or more of said corporate plaintiffs were engaged in both interstate and intrastate commerce. It is also true that these parties for the purpose of the suit, were considered to be proper parties to maintain the action as a class action (paragraph 2, p. 112, Appellants' Jurisdictional Statement). The Stipulation further limited the plaintiffs capacity by the statement contained in paragraph 2.1 (p. 112, Appellants' Jurisdictional Statement) — "Plaintiffs in their said representative capacity do not act with relation to any special circumstances or matters as they may affect particular individuals."

It was in this posture that the District Court made its findings and judgment (Appellees' Appendix 2, p. 12). The District Court found as to said stipulation the following:

> "1. That the Plaintiffs are proper parties to bring and maintain this action individually and as representative of and for all others similarly situated for the determination of the power, jurisdiction and

authority of the Defendants to pass and enforce the aforesaid ordinances.

* * * *

"3. That the questions presented in this action are entirely questions of law as to the validity of said ordinances and that no disputed questions of fact are involved.

"4. That there are no questions presented as to the procedural adoption of said ordinances but that the questions presented relate to the substantive validity of said ordinances and the jurisdiction to adopt or to enforce the same."

The District Court then entered its final judgment therein (a) that Ordinance No. 234, denominated as an Earnings Tax, was beyond the power of the City and County of Denver to adopt and enforce because of Sec. 17 of Article X of the Colorado Constitution, and permanently enjoining its enforcement (Appellees Appendix 2, pp. 13, 14); (b) that Ordinances Nos. 232 and 233 (Appellees' Appendix 2, pp. 13, 14) and amendments thereto, "are valid, constitutional and enforceable." In its findings as to Ordinances Nos. 232 and 233 and amendments thereto, the District Court specially relied upon four Colorado cases to support its determination — *Post v. City of Grand Junction*, 118 Colo. 434, 195 P. 2d 958; *Jackson v. City of Glenwood Springs*, 122 Colo. 323, 221 P. 2d 1083; *Ping v. City of Cortez*, 139 Colo. 575, 342 P. 2d 657; and *City of Englewood v. Wright*, 147 Colo. 537, 364 P. 2d 569 (Appellees' Appendix 2, p. 13).

Both parties sued out Writs of Error from the District Court to the Supreme Court of the State of Colorado. The latter Court in the majority opinion by Mr. Justice

Day (Appellants' Appendix A-1, p. 10) by reason of the aforesaid stipulation (Appellants' Appendix F) limited its determinations by this language:

> (p. 42) "We state at the outset that what is not involved or intended to be covered in this decision is the rights, exemptions and immunities of the individual employers and employees as they may believe their respective positions to be under the definitions and the terms of the ordinances .... We further add that with reference to the myriad administrative questions which may arise as to the named plaintiffs in their individual capacities, or as to other individuals similarly situated relating to their special circumstances under the ordinances held to be valid, there is provided in these ordinances administrative procedures which must be exhausted before review may be had in the Courts.
>
> "Also we further state that *what we do hold herein* is limited as provided in the stipulation to the question of power, jurisdiction and authority (of Denver) to pas and enforce the several ordinances and the taxes and impositions asserted to be made by them."

The Colorado Supreme Court then affirmed the judgment of the District Court holding Ordinance No. 234 (Earnings Tax) invalid by virtue of the prohibitions contained in Sec. 17 of Article X of the Colorado Constitution. This ruling has been accepted by Denver and the power of Denver to impose such a tax is now moot. With respect to the remaining ordinances, the Colorado Supreme Court, likewise, affirmed the District Court judgment with respect to Ordinances Nos. 232 and 233. It determined the

validity of Ordinance No. 232 specifically on the basis of Colorado law previously amended by it in the cases of *Post v. Grand Junction*, supra; *Jackson v. Glenwood*, supra; *Ping v. Cortez*, supra; and *Englewood v. Wright*, supra, on the basis of the "doctrine of stare decisis on which municipalities have extensively relied in the imposition of similar taxes, dictates that the four cited cases have settled the law and set at rest constitutional questions raised thereon."

The Colorado Supreme Court with respect to Ordinance No. 233, determined that the tax imposed thereby was not "a flat tax on income", but was valid and "limited to an employee engaged in an occupation, i.e., one who is performing such service for an employer, as defined, within Denver for any period of time in a calendar month upon a salary, wage, commission or other compensation basis". The Court then went on to hold that the four cases previously cited as upholding the validity of Ordinance No. 232, control Ordinance No. 233. The exemption of those earning less than $250 per month was held to be a reasonable classification, approved in cited Colorado cases, as a "concrete way of exempting those who perform only minimal services within Denver". The question raised as to the withholding portion of Ordinance No. 233 was held valid on the stated grounds, "that there is no constitutional prohibition against such imposition upon employers who must withhold state and federal income taxes. This should be answer in itself to this argument."

The tax imposed by Ordinance No. 232, denominated Business Occupational Privilege Tax (Appellants' Appendix C) can best be described by the legislative intent set forth in Section 2-1 thereof (pp. 76 and 77, Jurisdictional Statement), viz:

"2-1 The Council of the City and County of Denver finds, determines and declares that considering the business and occupations in the City and County of Denver, and the relations of such business and occupations to the municipal welfare, as well as the relation thereof to the expenditures required by the City and County proper, just and equitable distribution of the tax burdens within the City and all matters proper to be considered in relation thereto, and that the tax imposed on each business herein defined is reasonable, proper, uniform and non-discriminatory and necessary for a just and proper distribution of tax burdens within the City and County of Denver."

The tax was imposed by Section 3-1 (p. 77, Jurisdictional Statement) upon a business with a fixed or transitory situs within Denver on the basis of $2.00 per month for the first owner, partner, manager or employee and the additional sum of $2.00 per month for each additional owner, partner, manager or employee who performs within Denver for any period of time in a calendar month any services or other activities in the operation of such business within Denver. Thereby, the tax was related solely to local activities of the businesses so taxed as performed within Denver by their managers and employees. This becomes doubly clear when Section 4-1 thereof (p. 79, Jurisdictional Statement, is examined, viz:

"4-1 Nothing contained in this article shall be construed to empower Denver to levy and collect the tax imposed upon any person engaged in business within Denver under the Constitution of the United States and the Constitution of the State of Colorado."

The tax imposed by Ordinance No. 233 denominated

Employee Occupational Privilege Tax (Appellants Appendix D) can likewise best be described by legislative intent, set forth in Section 2 thereof (p. 83, Jurisdictional Statement), viz:

> "2 Legislative Intent.
>
> "2-1 The Council of the City and County of Denver determines and declares that the performance of services within Denver by an employee for an employer as herein defined, for any period of time in a calendar month for wages as herein defined, is the exercise of a taxable privilege, whether or not all or only part of the services of such natural person are performed within Denver.
>
> "2-2 The Council of the City and County of Denver further determines and declares that considering the relationship existing between the exercise by employees of the taxable privilege set forth in subsection 2-1 hereof, and the expenditures required by Denver for street maintenance, police and fire protection and other municipal services and to provide for the general welfare, and the relationship of the exercise of said taxable privilege of employees to a proper, just and equitable distribution of the tax burdens within Denver and all matters considered in relation thereto, that the tax herein imposed on employees is reasonable, proper, uniform, non-discriminatory and necessary for a just and proper distribution of the tax burdens within Denver."

The tax was imposed by Section 3-1 (pp. 83 and 84, Jurisdictional Statement) upon an employee who performs services within Denver for any period of time in a calendar month for an employer at the rate of $2.00 for each

and every month in which he is so employed. An employee by Section 1-2 (p. 82, Jurisdictional Statement) was defined as one who receives as compensation no less than $250.00 per calendar month. This Ordinance, like Ordinance No. 232, provides in Section 5 (pp. 86 and 87, Jurisdictional Statement) that:

> "Nothing in this article shall be construed to empower Denver to levy and collect the tax hereby imposed upon any taxpayer not within the taxing power of Denver, under the Constitution of the United States and the Constitution laws of the State of Colorado."

Argument and Conclusion

As shown by the above factual statement, no substantial federal questions exist in the record with reference to Ordinances Nos. 232 and 233. In fact, it is our opinion that the facts reveal that no federal questions were presented properly or improperly in this cause in the Colorado Courts.

This Honorable Court has repeatedly sustained state and local taxes, such as the taxes imposed here by Denver, against claims of violation of the Due Process Clause of the Fourteenth Amendment, and claims of creation of an unconstitutional burden upon interstate commerce, if the taxing authority "has given anything for which it can ask return", or "some definite link, some minimum connection between a state and the person, property or transaction it seeks to tax." *Wisconsin v. J. C. Penney Co.*, 311 U.S. 435, 444; *Freeman v. Hewitt*, 329 U.S. 249, 253; *Central Greyhound Lines, Inc. v. Mealey*, 334 U.S. 653, 663; *Northwestern States Portland Cement v. State of*

Minnesota, 358 U.S. 450, 462; *Standard Oil Co. v. Peck*, 342 U.S. 382; *Ott v. Mississippi Val. Barge Line Co.*, 336 U.S. 169; *Miller Bros. Co. v. State of Maryland*, 347 U.S. 340; *Scripto, Inc. v. Carson*, 362 U.S. 207; and *American Oil Co. v. Neill*, 380 U.S. 451.

In these ordinances we have the presence within Denver and the performance of services of the businesses and employees taxed, which is the required minimum connection or link; and the furnishing of the services set forth in the legislative intent sections of the ordinances for which Denver can by said taxes ask return.

In view of the decisions aforesaid, there cannot be found in the record before the Colorado Courts any question under the Due Process or Commerce Clauses as to the invalidity of the Ordinances Nos. 232 and 233 sufficiently substantial to support the appeal herein.

The Jurisdictional Statement also contains averments as to violation of the Equal Protection Clause of the Fourteenth Amendment based upon discrimination resulting from the exemption of those earning less than $250.00 per month. This Honorable Court has repeatedly held that "Equal protection does not require identity of treatment. It only requires that classification rests on real and not feigned differences, that the distinctions have some relevance to the purpose for which the classification is made, and that the different treatments be not so disparate, relative to the difference in classification as to be wholly arbitrary". *Walters v. City of St. Louis, Mo.*, 347 U.S. 231, 244; and that a state or local government "in its discretion it may tax all, or it may tax one or some, taking care to accord to all *in the same* class equality of rights. *Southwestern Oil Co. v. State of Texas*, 217 U.S. 114, 121;

Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522; *Aero Mayflower Transit Co. v. Board of R.R. Com'rs. of State of Montana*, 332 U.S. 495; *Skinner v. State of Oklahoma, ex rel. Williamson*, 316 U.S. 535; *Caskey Baking Co. v. Commonwealth of Virginia*, 313 U.S. 117; *Clark v. Paul Gray, Inc.*, 306 U.S. 583; *New York Rapid Transit Corp. v. City of New York*, 303 U.S. 573; *Great Atlantic and Pacific Tea Co. v. Grosjean*, 301 U.S. 412; and *Dominion Hotel, Inc. v State of Arizona*, 249 U.S. 265.

The classification imposed under Ordinance 233 is clearly valid under the foregoing decisions. For the reasons aforesaid, we assert that the appeal herein does not present a substantial federal question on the issue of violation of the Equal Protection Clause.

It is our opinion also that the judgment of the Colorado Courts rests on adequate state constitutional grounds, as is apparent from the majority opinion of Mr. Justice Day (Appellants' Appendix A-1).

Respectfully submitted,

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Appendix 1.

STATE OF COLORADO, ss.

In the Supreme Court Thereof.

TO THE PEOPLE OF THE STATE OF COLORADO,
To the District Court of the City and County of Denver and State of Colorado,

Greeting:

WHEREAS, lately in the District Court of the City and County of Denver, State aforesaid, in a certain cause therein pending between DUFFY STORAGE AND MOVING CO., ET AL., *Plaintiffs* and THE CITY & COUNTY OF DENVER, ET AL., *Defendants*,

AND WHEREAS, the said cause was brought into our SUPREME COURT OF THE STATE OF COLORADO, by writ of error to said District Court.

AND WHEREAS, at the January Term of our Supreme Court, in the year of our Lord one thousand nine hundred and sixty-nine, the said cause came on to be heard before our said SUPREME COURT on the 5th day of February, A. D. 1969 (the same being one of the Judicial days of said term) and the following proceedings were had and entered of record in said cause, to-wit:

---

*The City and County of Denver, etc. et al., vs. Duffy Storage and Moving Co., et. al.,

No. 23940 & 23941 vs.

*Duffy Storage and Moving Co., et al., vs. The City and County of Denver etc. et al.,

(*Captions abbreviated)

Error to the District Court of the
City and County of Denver (C-08472)

This cause having been brought to this Court by writ of error to review the judgment of District Court of the City and County of Denver, and having been heretofore argued by counsel and submitted to the consideration and judgment of the Court upon the matters assigned as constituting error in the proceedings and judgment of said District Court and it now appearing to the Court that there is no error in the proceedings and judgment of said District Court.

It is therefore ordered and adjudged that the judgment of said District Court be and the same is hereby affirmed, and that it stand in full force and effect; and that this case be remanded to said District Court for such other and further proceedings, according to law, as shall be necessary to the final execution of the judgment of said District Court in the cause, notwithstanding the said writ of error.

Now, Therefore, this cause is remanded to you, the said District Court, in and for the said City and County of Denver and State aforesaid that such further proceedings may be had in said cause as shall conform to the judgment of this Court entered as aforesaid, as also with the opinion filed therein.

WITNESS the HONORABLE ROBERT H. MCWILLIAMS, Chief Justice of our Supreme Court and the Seal thereof, affixed at my office in the City of Denver, this 17th day of February A.D. 1969.

RICHARD D. TURELLI,
Clerk Supreme Court. By *Florence Walsh*, Deputy.

Appendix 2.

IN THE DISTRICT COURT IN AND FOR THE CITY AND COUNTY OF DENVER STATE OF COLORADO

Civil Action No. C-8472. Div. 8.

DUFFY STORAGE AND MOVING CO.; James A. DUFFY; GEORGE V. SIMONE; DENVER AUTO TRIMMING SUPPLY CO.; HOUSTON GIBSON; WINSLOW CRANE SERVICE CO.; THOMAS & SON TRANSFER LINE, INC.; and RIDGE EREC-TION CO., *Plaintiffs,*

vs.

THE CITY AND COUNTY OF DENVER, a municipal corporation; THE BOARD OF COUNCILMEN OF THE CITY AND COUNTY OF DENVER, sometimes also known and referred to as THE CITY COUNCIL OF THE CITY AND COUNTY OF DENVER, and ROBERT B. KEATING, JOHN F. KELLY, IRVING S. HOOK, PAUL A. HENTZELL, KENNETH A. MacINTOSH, CARL N. DeTEMPLE, EDWARD F. FURKE, JR., ELVIN R. CALDWELL, ERNEST P. MARRAZINO, as the members of and being and constituting THE BOARD OF COUNCILMEN OF THE CITY AND COUNTY OF DENVER, sometimes also known and referred to as THE CITY COUNCIL OF THE CITY AND COUNTY OF DENVER; and CHARLES L. TEMPLE, as Manager of Revenue of THE CITY AND COUNTY OF DENVER,

Defendants.

THIS MATTER came on for trial on December 18,

1968, Plaintiffs appearing by counsel, George Louis Creamer, and Defendants appearing by City Attorney, Max P. Zall, and Assistant City Attorney, W. Keith Peterson.

On said day the Court heard the statements and arguments of counsel and continued the matter to December 19, 1968 for further argument at the termination of which the Court took the matter under advisement.

The Court having considered the statements and arguments of counsel and now being fully advised in the premises,

FINDS:

That this is an action for declaratory judgment as to the validity of Ordiances Number 232, 233 and 234, Series of 1968, of the City and County of Denver and the amendments thereto.

That it is stipulated by and between the parties hereto as follows:

1. That the Plaintiffs are proper parties to bring and maintain this action individually and as representative of and for all others similarly situated for the determination of the power, jurisdiction and authority of the Defendants to pass and enforce the aforesaid Ordinances,

2. That Plaintiffs' Exhibits A, B and C and Defendants' Exhibits 1 and 2 may be received in evidence as the texts of the subject Ordinances and amendments thereto,

3. That the questions presented in this action are entirely questions of law as to the validity of said ordinances and that no disputed questions of fact are involved, and

4. That there are no questions presented as to the procedural adoption of said ordinances but that the questions presented relate to the substantive validity of said ordinances and the jurisdiction to adopt or to enforce the same.

That Ordinances Number 232 and 233, Series of 1968, of the City and County of Denver and the amendments thereto involve the imposition of a "Business Occupational Privilege Tax" and an "Occupational Tax Upon Employees, both of which are to be effective on and after 11:59 P.M., December 31, 1968, while Ordinance Number 234, Series of 1968, of the City and County of Denver involves the imposition of an "Earnings Tax For General Revenue Purposes," to be effective on and after March 31, 1969.

That the City and County of Denver has authority and power to impose occupational taxes under Article XX of the Constitution of Colorado.

That Ordinances Number 232 and 233, Series of 1968, of the City and County of Denver, as amended, impose valid occupational taxes under *Post, et al vs. City of Grand Punction,* 118 Colo. 434, 195 P. 2d 958; *Jackson, et al vs. City of Glenwood Springs,* 122 Colo. 323, 221 P. 2d 1083; *Ping vs. City of Cortez, etc.,* 139 Colo. 575, 342 P. 2d 657 and *City of Englewood, et al vs. Wright, et al,* 147 Colo. 537, 364 P. 2d 569.

That the Supreme Court of the State of Colorado

held in *Denver, et al vs. Sweet, et al,* 138 Colo. 41, 329 P. 2d 441, that the City and County of Denver does not have the authority and power to impose an income tax.

That the Defendants have not seriously contended that the tax to be imposed by Ordinance Number 234, Series of 1968, of the City and County of Denver is not an income tax and the same is found to be an income tax by this Court.

That said Ordinance is, therefore, in violation of Article X, Section 17 of the Constitution of Colorado under the holding of *Denver, et al vs. Sweet, et al,* supra, and, as such, the same is unenforceable.

That the Plaintiffs have requested injunctive relief restraining the Defendants from enforcing said Ordinance Number 234.

That, the said Ordinance Number 234 being invalid, the entry of a permanent injunction, as to the enforcing of the same, is justified.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED, as follows:

That Ordinances Number 232 and 233, Series of 1968, of the City and County of Denver and amendments thereto are valid, constitutional and enforceable and Plaintiffs' Complaint as to said Ordinances Number 232 and 233, Series of 1968, of the City and County of Denver and amendments thereto should be and hereby is dismissed.

That Ordinance Number 234, Series of 1968, of the City and County of Denver is in violation of Article X, Section 17 of the Constitution of Colorado and judgment

should be and hereby is entered declaring the same to be null and void and of no effect.

That the Defendants and each of them should be and hereby are enjoined from directly or indirectly, through their agents, servants, officers or employees, attempting to enforce the provisions of Ordinance Number 234, Series of 1968, of the City and County of Denver or endeavoring to collect any tax, imposition of levy thereunder.

DONE IN CHAMBERS this 20th day of December, 1968.

BY THE COURT:

E. J. KEATING
Judge

SUPREME COURT OF THE UNITED STATES

October Term, 1969.

DUFFY STORAGE & MOVING CO. ET AL. *v.*
CITY & COUNTY OF DENVER ET AL.

APPEAL FROM THE SUPREME COURT OF COLORADO.

No. 132. Decided October 13, 1969.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.